Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RICHARD M. PARKER *et al.*,
Petitioners,

v.

DAVID S. WAKELIN *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the statute establishing a state retirement system does not expressly provide that a contractual relationship exists between the state and employees who are members of that system, do such employees ever acquire a right to retirement benefits that is protected by the Contracts Clause of the United States Constitution, and, if so, under what circumstances do they acquire such a right?; and

2. Does the "unmistakability doctrine" apply in determining whether a contractual relationship exists between a state and employees who are members of a state retirement system, and, if so, does the doctrine restrict a court to an examination of the statutory language in making that determination, or may a court inquire into the history, purpose, and circumstances surrounding enactment of the statute establishing the state retirement system?

PARTIES

PETITIONERS

Richard M. Parker,
Paul L. Hutchins,
R. Jeffrey Caldwell,
Ruth M. Guavin,
Rosanne M. H. Graef, and
Jean L. Hefele,
as active Maine public school teachers, who are members of the Maine State Retirement System, on behalf of themselves and all other similarly situated Maine public school teachers, and
the Maine Education Association

RESPONDENTS

David S. Wakelin,
Claude R. Perrier,
John H. Kimball,
William C. Bullock, Jr.,
George A. Burgoyne,
Eunice Cotton,
Charles M. Jackson,
Grover B. MacLaughlin, and
the Maine State Retirement System

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard M. Parker, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *Parker v. Wakelin*, 123 F.3d 1 (1st Cir. 1997).

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 123 F.3d 1 (1st Cir. 1997), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a. The opinion of the United States District Court for the District of Maine is reported at 937 F. Supp. 46 (D. Me. 1996), and is reprinted in Pet. App. at 18a.

JURISDICTION

The opinion of the Court of Appeals panel was issued on August 11, 1997. A timely Petition for Rehearing and

Suggestion for Rehearing *En Banc* was denied on October 17, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause of the United States Constitution, U.S. Const. Art. I, § 10, cl. 1, provides in relevant part as follows:

> No state shall . . . pass any . . . Law impairing the Obligation of Contracts.

The Maine State Retirement System is codified at 5 M.R.S.A. § 17001 *et seq.*, and is reprinted in relevant part in Pet. App. at 44a.

STATEMENT OF THE CASE

A. Factual Background

The individual petitioners are active Maine public school teachers who are members of the Maine State Retirement System ("MSRS"). These petitioners serve as class representatives for all such public school teachers. The Maine Education Association, an employee organization that represents, *inter alia*, the interests of Maine public school teachers, also is a petitioner.

The MSRS was established by the Maine legislature in 1942. Its purpose is "to encourage qualified persons to seek public employment and to continue in public employment during their productive years." 5 M.R.S.A. § 17050. All Maine state employees, including the public school teachers comprising the class in this case, are required as a condition of their employment to be members of the MSRS. 5 M.R.S.A. §§ 17001(14), 17651.

The MSRS is a "defined benefit" System, in that the retirement benefits provided for members are defined upon employment. All MSRS members make mandatory contributions into a pension fund, to which the State also

contributes in order to maintain the fund's actuarial soundness with regard to future benefit obligations. 5 M.R.S.A. §§ 17701-A, 17701-B, 17153(1-A)(B). Members of the MSRS qualify to receive retirement benefits upon (1) reaching the statutory retirement age, and (2) satisfying the years of service requirement (either at least ten years of creditable service, or at least one year of creditable service prior to reaching the statutory retirement age while still in public service). 5 M.R.S.A. § 17851. Alternatively, a member is eligible to receive retirement benefits regardless of age when he or she retires with at least 25 years of creditable service. *Id.*

Members who terminate their public employment *before* satisfying the years of service requirement are entitled to a return of their contributions, with interest. 5 M.R.S.A. § 17705(2). Members who terminate their public employment *after* satisfying the years of service requirement, but who have not yet reached the statutory retirement age, have an option. Such members can receive a return of their contributions, with interest, *id.*, or can wait until they satisfy the age requirement, and then begin to receive the retirement benefits to which they are entitled. 5 M.R.S.A. § 17851(2) & (2-A).

Prior to 1975, the MSRS contained no express provision as to the ability of the Maine legislature to amend the retirement benefits structure. In 1975, a provision dealing with this matter—5 M.R.S.A. § 17801—was added to the MSRS. Certain minor language changes were made in 1989, and since that date Section 17801 has provided as follows:

> No amendment to this Part may cause any reduction in the amount of benefits that would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

In order to save money by reducing State contributions to the MSRS, the Maine legislature adopted six amendments to the System in 1993, all of which operate to the disadvantage of MSRS members without providing any offsetting benefits. Pet. App. at 4a. The 1993 amendments may be divided into two groups: (1) three of the amendments apply only to members of the MSRS who had not met the years of service requirement as of the effective date of the amendments;[1] the other three amendments apply to all members of the MSRS, including those who had met the statutory age and years of service requirements as of the effective date of the amendments, but who had not yet retired.[2]

B. Proceedings Below

Petitioners challenged all of the 1993 amendments to the MSRS in the United States District Court for the District of Maine. Petitioners alleged, *inter alia*, that by virtue of their membership in the MSRS, all teachers in the plaintiff class had a contract with the State, which was impaired by the 1993 amendments in violation of the Contracts Clause of the United States Constitution. The district court found for petitioners in part, drawing a distinction between those members of the MSRS who had satisfied the years of service requirement as of the effective date of the 1993 amendments—whose retirement benefits the court described as "vested"—and those members who had not met the years of service requirement—whose retirement benefits, by the court's definition, had not yet

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[1] These amendments (1) increase the retirement age, 5 M.R.S.A. § 17851(1-A), (2) increase the early retirement penalty, 5 M.R.S.A. § 17852(3-A), and (3) remove unused sick pay from the calculation of retirement benefits, 5 M.R.S.A. § 17001(13)(B).

[2] These amendments (1) increase the rate of required contributions, 5 M.R.S.A. § 17001-B, (2) cap the salary increase that may be included in calculating retirement benefits 5 M.R.S.A. § 17701(13)(C), and (3) delay the first cost-of-living adjustment to retirement benefits, 5 M.R.S.A. § 17806(3).

vested. Pet. App. at 35a. The district court held that the 1993 amendments violated the Contracts Clause only as applied to those members of the MSRS whose retirement benefits had vested. *Id.* at 35a-39a.

Both parties appealed. The First Circuit reversed the district court to the extent that it found the 1993 amendments violative of the Contracts Clause with regard to *any* members of the MSRS.

The court below began its analysis by noting that "[t]his appeal raises a legal issue of considerable importance," Pet. App. at 6a, which it formulated as follows:

> [W]hether a legislative amendment to a state employee retirement pension plan that is detrimental to employees triggers further scrutiny under the Contract Clause as applied to state employees whose pension rights under the plan have "vested" prior to such amendment. [*Id.*]

According to the First Circuit, "a blanket answer" to the above question "is not possible, because . . . a detailed examination of the particular provisions of a state pension program will be required prior to determining the nature and scope of the unmistakable contractual rights, if any, that are created by a given state legislature." *Id.* The court then held that this examination must be conducted pursuant to the "unmistakability doctrine," which, the court explained, requires the following:

> [F]or the purposes of the Contract Clause, there must be a clear indication that the legislature intends to bind itself in a contractual manner. [citation omitted] "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." [*Id.* at 8a (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) (internal quotation marks omitted))].

Turning to the MSRS, the dispositive question for the First Circuit was whether it "evinces a clear intent on the part of the Maine legislature to create contractual rights against the modification of pension benefits." *Id.* at 14a. Answering this question is difficult, according to the court, because "[t]he law governing the rights of members of public employee retirement plans varies greatly from state to state, and has not been the subject of federal regulation or harmonization." *Id.* at 10a. The court noted particularly the absence of "guidance" from this Court "as to the rights public employees have to their pensions." *Id.* Although this Court's last pronouncement on the matter—its century-old decision in *Pennie v. Reis*, 132 U.S. 464 (1889), indicating that state employee retirement systems do not create contractual rights, but provide mere gratuities that a legislative freely may modify—never has been explicitly overruled, the First Circuit observed that "this 'gratuity' approach has been rejected by most state courts, . . . [and] *Pennie* has . . . been ignored as a precedent." Pet. App. at 10a. The court below noted that the other federal Circuits to have addressed the question (*i.e.*, the Fourth and the Ninth) both have rejected the gratuity approach, *id.* at 10a-11a, and it "recognized the diversity of contract theories adopted by state courts—in particular the divergence of approaches with regard to when exactly binding rights to a certain level of retirement benefits 'vest.'" *Id.* at 12a.

The First Circuit then turned to the language of the MSRS, "ask[ing] whether the Maine Legislature has unmistakably evinced the intention to create binding contractual rights." *Id.* at 14a. Contrary to the position taken by the district court, the court below rejected the claim that the MSRS "should be read to protect a teacher —and possibly to create contract rights—whenever a teacher satisfies the service requirements even though the teacher is still in active service and no pension is currently payable." *Id.* at 15a. The court did so based on its conclusion that what the court saw as the critical stat-

utory provision—5 M.R.S.A. § 17801, which prohibits a reduction in retirement benefits that "would be due [to] a member"—"does not clearly *compel* such a reading." Pet. App. at 15a (emphasis added). Although acknowledging that "the statute [is] unclear," that the relevant decision of the Maine Supreme Court "leaves the issue open," that "this is a possible reading," that "there is some evidence indicating that certain legislators wanted to protect vested rights," and that "the Maine Legislature in enacting section 17801, responded to a report that recommended the protection of employees' accrued retirement benefits from retroactive reductions," the First Circuit held that the unmistakability doctrine was not satisfied. Pet. App. at 16a. As the court put it, "we do not think this language could be said to reflect the unmistakable intent of the Maine Legislature . . . ." *Id.*[3]

REASONS FOR GRANTING THE WRIT

This Petition presents two related—albeit analytically distinct—questions involving application of the Contracts Clause of the United States Constitution to state retirement systems.[4] Both of these questions concern the threshold inquiry of the Contract Clause analysis—*i.e.*, whether a contractual relationship has been established, so as to trigger constitutional scrutiny.[5]

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[3] The First Circuit left open the questions of "whether, in order to satisfy the unmistakability doctrine, a public pension statute must explicitly employ the language of contract . . . [and] whether Contract Clause principles would apply if Maine sought to reduce pension benefits already 'due' to present retirees. . . ." Pet. App. at 16a-17a.

[4] Because this case involves a state retirement system, we use that term in this Petition. The analysis extends, however, to any non-federal public sector retirement system, including the large number of such systems that have been established by local governments.

[5] If this question is answered in the affirmative, the next step is to determine whether the claimant's contractual rights have been substantially impaired, and, if so, whether that impairment was

The first, and fundamental, question presented is whether, and under what circumstances, a state retirement system establishes a contractual relationship between the state and the members of the system that comes within the ambit of the Contracts Clause. This question is limited to the typical situation in which the state legislature has not expressly indicated whether such a contractual relationship is established—a situation in which the court below recognized "the diversity of contract theories adopted by state courts" for making this determination. Pet. App. at 12a. In Part I, we demonstrate why this Court should grant review in order to revisit the obsolete position that it took more than a century ago, and provide guidance to the many state and federal courts that are struggling with this important question of federal law.

The second question presented, which has two parts, involves the analytical framework a court should apply in answering the first question. The holding of the court below—*i.e.*, that there is no contractual relationship between the class members and the state—resulted from its application of the "unmistakability doctrine." The first part of this question is whether, as the First Circuit believed, that doctrine applies in determining whether and when contractual rights arise under a state retirement system—notwithstanding that the state is acting in its capacity as an employer and is not exercising a "sovereign power" of government; the second part assumes that the unmistakability doctrine does apply, and asks whether that doctrine restricts a court to an examination of the statutory language, and bars inquiry into the history, purpose, and circumstances surrounding enactment of the statute in question. In Part II, we demonstrate why this impor-

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"reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). These latter questions are not implicated by this Petition, inasmuch as the First Circuit denied all relief on the ground that petitioners had *no* contractual rights. Accordingly, it is only the existence *vel non* of a contractual relationship that is before this Court.

tant question of federal law should be settled by this Court.

I. THE ESTABLISHMENT OF A CONTRACTUAL RELATIONSHIP

A. *Pennie v. Reis*

Framing the issue before it as "whether a legislative amendment to a state employee retirement pension plan that is detrimental to employees triggers further scrutiny under the Contract Clause as applied to state employees whose pension rights under the plan have 'vested' prior to such amendment," Pet. App. at 6a, the First Circuit itself proceeded to make a persuasive case as to why this question warrants review.

The court below noted that this is "a legal issue of considerable importance," *id.*,[6] observing that the answer

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[6] This would be true if for no other reason than the vast number of employees who are members of state retirement systems. Every state has at least one retirement system, and several states have more than one system, often providing separate coverage for public school teachers. According to the most recent statistics available, there are over 2,000 different state and local government retirement systems in existence, with more than ten million active members. *See* Employee Benefit Research Institute, *EBRI Databook on Employee Benefits* 148 (4th ed. 1997).

Moreover, the federal law question of whether and when members of a state retirement system acquire rights that are protected by the Contracts Clause has become an increasingly active source of litigation in both federal and state courts, as more and more states attempt to deal with budgetary problems by reducing their financial obligations under such systems. *See* Roberta Romano, *Public Pension Activism in Corporate Governance Reconsidered*, 93 Colum. L. Rev. 795, 802 (1993) ("In the 1990s, states experiencing fiscal difficulty have taken unilateral action against fund assets rather than employ the earlier New York approach of 'requesting' their use in public debt purchases. Among the tactics employed are reducing contributions to retirement funds, altering actuarial and income assumptions in order to decrease contribution levels, and transferring assets from pension fund to general state accounts. These policies are especially troubling because many state pension funds are in weak financial condition . . . ."); Darryl B. Simko,

"varies greatly from state to state, and has not been the subject of federal regulation or harmonization." *Id.* at 10a. "There is no modern Supreme Court case that provides guidance as to the rights public employees have to their pensions," *id.*, this Court having last spoken to the matter more than a century ago in *Pennie v. Reis*, 132 U.S. 464 (1889). The position taken in *Pennie*—*i.e.*, that state retirement systems "do not create vested rights against legislative modifications, and thus are gratuities that a state may freely revoke," Pet. App. at 10a—"has been rejected by most state courts." *Id.* Accordingly, although *Pennie* "has never been explicitly overruled," it has "been ignored as a precedent" by state supreme courts, and by the Fourth and Ninth Circuit Courts of Appeals, the "only two other circuits [to] have addressed this question." *Id.*

This Court has explained that when one of its decisions directly controls on an issue of federal law, all other courts are bound to apply that existing precedent, regardless of how they believe this Court might decide the issue if presented to it again in the future. *See Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) ("We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))). Because *Pennie* remains "good law," it is technically controlling—although the position taken quite obviously is obsolete. This Court should grant review in order to revisit *Pennie*, and to "provide[] guidance as to the rights public employees have to their pensions," *Parker*, 123 F.3d at 6, Pet. App. at 10a, that reflects modern Contracts Clause jurisprudence.

Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint, 69 Temple L. Rev. 1059, 1059-60 (1996). *See also* cases cited *infra* at 12-15.

B. The Conflict Among State Courts of Last Resort and Federal Courts of Appeals

The question presented here—*i.e.*, whether or not in the absence of an express declaration by a state legislature, there is a contractual relationship between a state and the members of a state retirement system that is sufficient to trigger scrutiny under the Contracts Clause—is a question of federal law. For this reason, there is considerable significance to what the court below recognized as "the diversity of contract theories adopted by state courts" in determining "when exactly binding rights" to retirement benefits arise under the Contracts Clause. Pet. App. at 12a. We develop this point below, and also reference the conflict among the federal courts of appeals that have addressed the question.

In the century since it was decided, *Pennie*'s "reasoning has been widely—and justifiably—criticized," Note, *Public Employee Pensions in Times of Financial Distress*, 90 Harv. L. Rev. 992, 994 (1977), and its gratuity approach has found only two adherents among the courts that have addressed the issue in the modern era. *See Cook v. Employees Ret. Sys.*, 514 S.W.2d 329, 331 (Tex. Civ. App. 1974); *Ballard v. Board of Trustees*, 324 N.E.2d 813, 815 (Ind. 1975). *But see Board of Trustees of Pub. Employees Ret. Fund v. Hill*, 472 N.E.2d 204, 208-09 (Ind. 1985) (holding that judges have contractual rights arising upon participation in a *voluntary* retirement plan).

Most courts view state retirement systems as creating a unilateral contract.[7] The basic theory is that the promise

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[7] Although courts sometimes discuss an employee's right to receive retirement benefits in terms of "deferred compensation," "detrimental reliance," or "promissory estoppel," the different terminology generally is used to describe what is essentially the contractual theory set forth in text. This Petition uses the term unilateral contract because it is the most common, and, we believe, most analytically proper formulation.

of retirement benefits is part of the compensation package that public employers offer to attract qualified employees, and once the offeree accepts the offer by tendering performance—*i.e.*, by starting employment—a unilateral contract exists. *See generally* Arthur L. Corbin, *Corbin on Contracts* § 2.29 (Joseph M. Perillo rev. ed. 1993); *cf.* 5 M.R.S.A. § 17050 (purpose of MSRS is "to encourage qualified persons to seek employment and to continue in public employment during their productive years"). The courts differ, however, on when contractual rights accrue.

1. Consistent with the traditional notion of a unilateral contract, many jurisdictions hold that a contractual right to the retirement benefits provided by the system exists from the first day of employment. *See Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965) (en banc); *Betts v. Board of Admin. of the Pub. Employees Ret. Sys.*, 582 P.2d 614, 617 (Cal. 1978); *Police Pension & Relief Bd. v. Bills*, 366 P.3d 581, 584 (Colo. 1961); *Nash v. Boise City Fire Dep't*, 663 P.2d 1104, 1108-10 (Idaho 1983); *Brazelton v. Kansas Pub. Employees Ret. Sys.*, 607 P.2d 510, 514 (Kan. 1980); *City of Frederick v. Quinn*, 371 A.2d 724, 726 (Md. App. 1977); *Opinion of the Justices*, 303 N.E.2d 320, 327 (Mass. 1973); *Campbell v. Michigan Judges Ret. Bd.*, 143 N.W.2d 755, 757-58 (Mich. 1966); *Sylvestre v. State*, 214 N.W.2d 658, 666-67 (Minn. 1973); *Halpin v. Nebraska State Patrolmen's Ret. Sys.*, 320 N.W.2d 910, 914-16 (Neb. 1983); *Public Employees' Ret. Bd. v. Washoe County*, 615 P.2d 972, 974-75 (Nev. 1980); *Association of Pa. State Coll. and Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 966 (Pa. 1984); *Burlington Fire Fighters Ass'n v. Burlington*, 543 A.2d 686, 689-90 (Vt. 1988); *Leonard v. City of Seattle*, 503 P.2d 741, 746 (Wash. 1972) (en banc); *Wagoner v. Gainer*, 279 S.E.2d 636, 643-44 (W. Va. 1981).

The Ninth Circuit took this approach in *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223,

1227-28 (9th Cir. 1990) (following the lead of the Nevada Supreme Court in *Washoe County, supra.*)[8]

2. Some jurisdictions reject the principle that a contract exists as soon as an employee begins to tender performance, and focus instead upon an employee's completion of performance, which under this approach is defined as meeting the requirement for "vesting" pursuant to the terms of the retirement system. All state retirement systems (and all private sector retirement systems as well) provide that an employee's retirement benefits vest after he or she satisfies a years-of-service requirement, although the employee may not be eligible to retire and actually receive those benefits until he or she reaches a certain age.[9] The courts in these jurisdictions take the position

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[8] Notwithstanding their agreement that a contract exists from the first day of employment, these jurisdictions differ as to the state's ability thereafter to modify the terms of the retirement system. Several courts have held that the state may not unilaterally amend the system in derogation of the employee's contractual rights at any time. *See Yeazell*, 402 P.2d at 545 (a contract is complete when an employee accepts employment, and a "contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party"); *Sylvestre*, 214 N.W.2d at 666-67; *Campbell*, 143 N.W.2d at 757-58. Other courts allow for certain "reasonable modifications" of the existing contract. As the Ninth Circuit explained in *Keating*, the reasonable modifications approach means that even though an employee has a contractual right to the retirement benefits in effect on the first day of his or her employment, if subsequent enactments "constitute[] a reasonable modification of the pension plan, then they [do] not create a substantial impairment of contractual obligations." 903 F.2d at 1227.

The reasoning in this line of cases is not always clear. As the language of the Ninth Circuit indicates, the holdings may to some extent involve the second prong of the Contracts Clause analysis—*i.e.*, whether the contract has been substantially impaired.

[9] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in State and Local Governments, 1994*, at 113-14 (1996):

> Even when an employee leaves an employer before becoming eligible for . . . a retirement benefit, a plan may ultimately

that an employee's benefits are contractually protected once they vest and cannot be altered by a subsequent legislative enactment. *See, e.g., Petras v. State Bd. of Pension Trustees*, 464 A.2d 894, 896 (Del. 1983).

3. A related view posits that performance is complete —and thus contract rights accrue—only when an employee actually is eligible to retire and receive retirement benefits. *See Pineman v. Oeschlin*, 488 A.2d 803, 809-10 (Conn. 1985); *Baker v. Oklahoma Firefighters Pension & Ret. Sys.*, 718 P.2d 348, 352-53 (Okla. 1986); *Blackwell v. Quarterly County Court*, 622 S.W.2d 535, 543 (Tenn. 1981). This differs from the vesting analysis in that an employee must satisfy both the years-of-service requirement *and* reach the statutory retirement age.

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pay a pension. . . . If certain conditions are satisfied at the time of separation, workers have a vested interest in all or a portion of their accrued pension benefits and may begin receiving benefits years later.

Although all State and local government pension participants are entitled to vested benefits, some variations exist as to when vesting occurs. A large majority of the participants in defined benefit pension plans have to complete 5 years of service at any age before benefits are guaranteed (cliff vesting). Most of the remaining participantse are in plans requiring 10 years of service. Participants not in plans with cliff vesting generally are covered by a graduated vesting provision, which increases the portion of guaranteed benefits as years of service increase. Full vesting usually comes after 7 years.

The question of when retirement benefits vest in accordance with this well-established definition—which is determined by the years-of-service requirement in the particular retirement system—is distinct from when retirement benefits come within the ambit of the Contracts Clause—which is a question of federal law as to which courts have taken the various approaches discussed in text. The First Circuit's references to the "creat[ion of] vested rights against legislative modifications," Pet. App. at 10a, and to "when exactly binding [contract] rights to a certain level of retirement benefits 'vest,' " *id.* at 12a, suggest that the court may have failed to grasp this distinction.

4. Another approach is to treat retirement benefits as noncontractual up to the point of actual retirement, prior to which the legislature is free to "modify or alter the benefits provided by . . . [the] retirement plan." *Florida Sheriffs Ass'n v. Department of Admin.*, 408 So.2d 1033, 1035 (Fla. 1981). The Court of Appeals for the Fourth Circuit took this position in interpreting a North Carolina retirement statute. *Kestler v. Board of Trustees of N.C. Ret. Sys.*, 48 F.3d 800, 803-04 (4th Cir.), *cert. denied*, 116 S. Ct. 186 (1995). Although asserting that the First Circuit has "never chosen to adopt a particular approach to *public* pension rights," Pet. App. at 12a (emphasis in original), the holding by the court below is consistent with this approach.[10]

The court below advised that, in determining whether a contractual relationship exists between a state and the members of a state retirement system, a court should "perform[] a close analysis of the statutory provision at issue." *Id.* at 13a. This is sound advice, and the diversity among the various jurisdictions may to some extent be attributable to differences in statutory structure. To a larger extent, however, this diversity is attributable to

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[10] Indeed, the court below may be seen as going beyond this approach, inasmuch as it left open the question of whether the Maine legislature could, without running afoul of the Contracts Clause, "reduce pension benefits already 'due' to present retirees . . . ." Pet. App. at 17a. *See supra* note 3.

Two other jurisdictions, while rejecting the notion that state retirement systems create enforceable contractual rights prior to retirement, have suggested that state employees "have legitimate retirement expectations" that "may constitute property rights that the legislature cannot deprive them of without due process of law." *Spiller v. State*, 627 A.2d 513, 517 n.12 (Me. 1993). *See also Pineman v. Oeschlin*, 488 A.2d 803, 809-10 (Conn. 1985). In *National Educ. Ass'n-R.I. v. Retirement Bd. of the R.I. Employees Ret. Sys.*, 972 F. Supp. 100 (D.R.I. 1997), the United States District Court for the District of Rhode Island analyzed a modification to the state retirement system under a property right theory.

the absence of a controlling analytical framework that can be applied to the statute in question. This Court has not addressed this matter in more than a century. It should grant review in order to provide the state and lower federal courts with a set of guiding legal principles that they can use to determine whether and when members of a state retirement system acquire rights that are protected by the Contracts Clause.

II. THE UNMISTAKABILITY DOCTRINE

In attempting to ascertain whether the Maine legislature intended to establish a contract between the State and the members of the MSRS for purposes of the Contracts Clause, the court below applied the "unmistakability doctrine"—according to which "there must be clear indication that the legislature intends to bind itself in a contractual manner." Pet. App. at 8a. The First Circuit's application of this doctrine is problematic in two respects, and raises an important question of federal law that should be settled by this Court.

A. Applicability to a State Retirement System

This Court recently has indicated that the unmistakability doctrine may not apply to contracts of the type involved in this case. In *United States v. Winstar*, 116 S. Ct. 2432 (1996), the plaintiff savings-and-loan institutions alleged that the government had encouraged them to enter into mergers by promising that goodwill and capital credits could be counted toward the capital reserve requirements imposed by federal regulations. *Id.* at 2447. A subsequently enacted statute took a contrary position, providing that goodwill and capital credits could not be counted for this purpose. The plaintiff institutions were seized for failing to meet the capital reserve requirements, and they alleged that the statute had breached a contractual commitment by the government to allow the practice. *Id.*

This Court held that the unmistakability doctrine did not apply in determining whether the government's promise created a contractual relationship, because the promise did not involve a "sovereign power" of the government. *Id.* at 2456-58. In so holding, this Court strictly limited the reach of the doctrine, confining it to situations in which "enforcement of the contractual obligation alleged would block the exercise of a *sovereign power* of the Government." *Id.* at 2457 (emphasis added). This Court identified a "sovereign power" as a "power peculiar to the Government," such as the power "to tax or control navigation," *id.*, as opposed to what this Court labeled "humdrum" contracts, such as military supply contracts. *Id.*; *see also id.* at 2477 (Scalia, J. concurring) ("The unmistakability doctrine has been applied in precisely this sort of situation—where a *sovereign act* is claimed to deprive a party of the benefits of a prior bargain with the government." (emphasis added)).

It is well-settled that where, as here, government is acting in its capacity as an employer, it is not exercising sovereign powers. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) ("[C]onstitutional review of government employee decisions must rest on different principles than review of speech restraints imposed by the government as sovereign."); *United States v. McAllister*, 119 F.3d 198, 201 (2d Cir. 1997) ("[T]here is 'ample support' in Supreme Court precedents for an approach that distinguishes between the government acting as sovereign and the government acting as an employer." (citation omitted)), *cert. denied*, 66 U.S.L.W. 3338 (U.S. Jan. 12, 1998); *Sharar v. Bowers*, 114 F.3d 1097, 1102 (11th Cir. 1997) (en banc) ("We also know that because the government's role as employer is different from its role as sovereign, we review its acts differently in the different contexts."), *cert. denied*, 66 U.S.L.W. 3338 (U.S. Jan. 12, 1998); *United States v. Reyes*, 87 F.3d 676, 680 (5th Cir. 1996) ("There is ample support for constitutionally distinguishing government acting as employer from gov-

ernment acting as sovereign."). Because no "power peculiar to the Government" is involved in the establishment of a state retirement system—private sector employers perform the same function—the unmistakability doctrine should not be applied in determining the existence *vel non* of a contractual relationship between a state and members of a state retirement system. This Court should grant review to establish this important point of federal law.

B. Inquiry Into the History, Purpose, and Circumstances Surrounding Enactment of a State Retirement System

Assuming, *arguendo*, that the unmistakability doctrine does apply in this context, the decision of the court below in any event raises an important question as to the manner of its application. Focusing solely on the phrase "benefits which would be due to a member . . . on the date immediately preceding the effective date of the amendment" in Section 17801 of the MSRS, the First Circuit concluded that a legislative intent to protect the retirement benefits of anyone other than employees who actually have retired could not be "unmistakably" shown. Read entirely out of context, the term "due to a member" may perhaps appear less than perspicuous. But nothing in the unmistakability doctrine restricts a court to an examination of the statutory language in attempting to determine whether a legislature intended to make a contractual commitment. To the contrary, the decisions of this Court indicate that the history of a statute, its purpose, and the circumstances surrounding its enactment are all sources to which a court should look in attempting to discern the unmistakable meaning of the words used by a legislature.

In *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451 (1985), for example, this Court first examined the language of the statute at issue, *id.* at 466-67, but then looked to the context of its enactment to ascertain whether the government had intended to

enter into a contract with the plaintiffs. *Id.* at 468-70. Although this Court held that the statute did not "constitute a binding obligation of Congress," it based this conclusion on the fact that "neither the language of the statute *nor the circumstances surrounding its passage* manifest any intent on the part of Congress to bind itself contractually." *Id.* at 470 (emphasis added). Likewise, in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), this Court explained that a statute may be treated as a binding contract "when the language *and circumstances* evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* at 17 n.14 (emphasis added).[11]

In sum, even assuming that the unmistakability doctrine applies in determining whether and when contractual rights arise under a state retirement system, this Court should grant review to make it clear that the doctrine does

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[11] *See also Winstar*, 116 S. Ct. at 2449 (in determining whether the government intended to make a binding contractual commitment, this Court resolved an "ambiguity" in the documents alleged to have established a contract by examining the "realities of the transaction," and specifically cited the Restatement (Second) of Contracts § 202(1) (1981): "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight"); *id.* at 2477 (Scalia, J., concurring) ("[T]he [unmistakability] doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation. It is simply a rule of presumed (or implied-in-fact) intent . . . . [C]ontracts must be interpreted in a common-sense way against that [presumption]."); *General Motors Corp. v. Romein*, 503 U.S. 181, 188 (1992) (stating that, for purposes of Contracts Clause analysis, "the terms to which the contracting parties give assent may be express *or implied in their dealings*" (emphasis added)); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (interpreting legislative intent to make contractual commitment in "view of *the purpose and structure*" of the statute at issue (emphasis added)); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938) (examining both language of statute and context of statute's passage, including the "policy which induced the legislation," in holding that teachers had enforceable contract with school districts).

not bar inquiry into the history, purpose, and circumstances surrounding enactment of the system.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. _____
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD M. PARKER *et al.*,
Petitioners,

v.

DAVID S. WAKELIN *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Nos. 96-2225 through 96-2228

RICHARD M. PARKER, *et al.*,
Plaintiffs, Appellees,
Cross-Appellants,

v.

DAVID S. WAKELIN, *et al.*,
Defendants, Appellants,
Cross-Appellees.

Heard April 8, 1997
Decided Aug. 11, 1997

Before TORRUELLA, Chief Judge, BOUDIN and LYNCH, Circuit Judges.

TORRUELLA, Chief Judge.

The question presented by this appeal is whether certain legislative amendments to the Maine State Retirement System ("MSRS") violate the Contract Clause of the United States Constitution as applied to plaintiffs, a class comprised of current Maine public school teachers all of whom are members of the MSRS. Following a bench trial, the district court held that certain amendments violated the Contract Clause as applied to those public employees who had satisfied the service requirements under

the MSRS and whose pension rights had thereby "vested." Finding no unmistakable intent on the part of the Maine legislature to create private contractual rights against the reduction of pension benefits prior to the point at which pension benefits may actually be received, we hold that the Maine amendments do not violate the Contract Clause with regard to any of the plaintiffs. Accordingly, we reverse the district court's holding that the amendments violate the Contract Clause as applied to "vested" members of the MSRS.

BACKGROUND

None of the relevant facts recited below are in dispute.

I. The Maine State Retirement System (MSRS)

The MSRS operates as a public pension trust pursuant to Maine's public employee retirement benefit statute. *See* 5 M.R.S.A. §§ 17001-18663 (1989 & Supp.1996). The MSRS was created in 1942 to encourage "qualified persons to seek public employment and to continue in public employment in their productive years." 5 M.R.S.A. § 17050 (1989). For all Maine state employees, including the public school teachers comprising the plaintiff class in the instant case, membership in the MSRS is mandatory. 5 M.R.S.A. §§ 17001(14), 17651 (1989). All MSRS members make mandatory contributions into a pension fund. The State of Maine also contributes annually to maintain the fund's actuarial soundness with regard to future benefit obligations. 5 M.R.S.A. §§ 17701-A, 17701-B, 171531(1-A)(B)(Supp. 1996). The MSRS can be classified as a "defined benefit system," in that the retirement benefits provided for teachers are defined upon employment and financed in part by their fixed contributions into the system.

The teachers, as members of the system, qualify to receive retirement benefits upon (1) reaching the statutory retirement age, *and* (2) satisfying *either* of the following

service requirements: (a) at least ten years of creditable service; or (b) at least one year of creditable service prior to reaching the statutory retirement age while in public service. 5 M.R.S.A. § 17851 (1989 & Supp. 1996). Alternatively, a member may be entitled to receive retirement benefits when he or she retires after performing at least 25 years of creditable service. *Id.* In the district court's decision, the term "vesting" was used to describe the satisfaction of the service requirements. *See Parker v. Wakelin*, 937 F.Supp. 46, 49 n. 1 (D.Me.1996). However, as the district court in fact noted, the term "vesting" does not figure in the statutory scheme itself, which simply indicates the age and service requirements that must be met. *See* 5 M.R.S.A. § 17851 (1989 & Supp.1996).[1] Members who terminate their public service prior to satisfying the pension eligibility requirements are entitled to a return of their contributions, with interest. 5 M.R.S.A. § 17705(2).

An eligible retiree earns a pension in the amount of two percent of his or her "average final compensation" multiplied by the number of years of total creditable public service (up to 25 years). 5 M.R.S.A. § 17852 (1989).[2] The legislative amendments at issue on this appeal affect, among other things, the process by which one computes an employee's "average final compensation" in such a manner as to reduce the expected pension benefits of many members.

The State of Maine concedes that the sole purpose for enacting the changes in the terms and conditions of retirement benefits ("the 1993 Amendments") was to save money by lowering budget allocations by the state to the

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[1] Other non-pension benefits under the retirement system, such as life insurance and disability retirement benefits, may be received without having satisfied any minimum service requirement.

[2] A slightly different method applies to those retirees whose eligibility is based on having completed 25 or more years of creditable service.

trust funds of the MSRS; their enactment coincided with other responses to a state fiscal crisis. The 1993 Amendments may be sorted into two groups: three changes apply to the pensions of *all* current teacher-members of the MSRS, while three others apply only to those who had not satisfied the service requirements under the MSRS as of the effective date of the amendments. None of the amendments affected retirees earning pensions as of the effective date. The amendments that affected all of the plaintiffs were: (1) an increase in the rate of required member contributions from 6.5 percent of their salary to 7.65 percent; (2) a cap on the salary increase that may be included in the course of calculating the level of teachers' retirement benefits; and (3) a six-month delay in the first cost-of-living adjustment of retirement benefits. *See* P.L. 1993, ch. 410, pt. L, §§ 28, 13, 31.[3] The district court held that these three modifications were unconstitutional as applied to those plaintiffs who had satisfied the service requirements. The other 1993 amendments, which only applied to those who had not served 10 years as of the effective date of the amendments, were: (1) an increase in the regular retirement age from 60 to 62; (2) an increase in the early retirement penalty from 2.25 percent to 6 percent of the teachers' retirement benefit for each year preceding age 62; and (3) the elimination of an inclusion of per diem payment of up to thirty days of unused sick or vacation pay in the course of calculating teachers' retirement benefits. *See* P.L.1993, ch. 410, pt. L, §§ 33, 35, 37, 12.[4] It is not disputed that the 1993 Amendments operate to the disadvantage of MSRS members without providing substantive offsetting benefits.

When the MSRS was first adopted in 1942, the legislature made no express statement as to its ability to amend

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[3] These provisions are codified as amended at 5 M.R.S.A. §§ 17001-B, 17701(13)(C), 17806(3).

[4] These provisions are codified as amended at 5 M.R.S.A. §§ 17851(1-A) & (2-A), 17852(3-A), 17001(13)(B).

or alter the pension benefit structure. In 1975, the Maine legislature enacted the following provision:

> No amendment to this chapter shall cause any reduction in the amount of benefits which would be due to the member based on creditable service, compensation, employee contributions and the provisions of this chapter on the date immediately preceding the effective date of such amendment.

P.L.1975, ch. 622, § 6, codified at 5 M.R.S.A. § 17801 (1989), under the title "Amendment not to cause reduction in benefit." [5]

II. The Proceedings Below

Plaintiffs, the Maine Education Association and a class representing public school teachers throughout the State of Maine, challenged the constitutionality of the 1993 Amendments under the Contract Clause, the Due Process Clause, and the Takings Clause, seeking declaratory and injunctive relief to block implementation. The district court held that: (1) the 1993 Amendments violated the Contract Clause only as applied to MSRS members whose benefits had "vested" under the system; and (2) the 1993 Amendments did not violate any other provision of the constitution. By using the term "vested" the district court referred to those MSRS members who had satisfied the service requirements under the system—a service requirement is a necessary (but not a sufficient) condition to being entitled to actually receive a pension. *See Parker v. Wakelin*, 937 F.Supp. at 49 n. 1.

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[5] The current version has a few minor changes in language:

> No amendment to this Part may cause any reduction in the amount of benefits that would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

On appeal, the state defendants ask that we hold that the 1993 Amendments do not violate the Contract Clause as applied to any of the plaintiffs. In their cross-appeal, the plaintiffs argue that the 1993 Amendments violate the Contract Clause as applied to *all* teacher members of the MSRS prior to the effective date of the amendments, and that the 1993 Amendments also violate substantive due process.

DISCUSSION

The essential facts being undisputed, this appeal turns on questions of law over which we exercise *de novo* review. *See Villafane-Neriz v. FDIC*, 75 F.3d 727, 730 (1st Cir.1996). This appeal raises a legal issue of considerable importance, one we specifically left unresolved in *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12, 19 (1st Cir.1996). When stated broadly, the issue is whether a legislative amendment to a state employee retirement pension plan that is detrimental to employees triggers further scrutiny under the Contract Clause as applied to state employees whose pension rights under the plan have "vested" prior to such amendment. In *McGrath*, we did not need to resolve this issue, because the plaintiff's pension rights had not vested prior to the legislative amendment at issue, and because the legislature specifically reserved the power to amend or terminate the plan as to nonvested members. 88 F.3d at 19-20. We now conclude that a blanket answer to the issue of Contract Clause protection for vested employees is not possible, because, as we explain below, a detailed examination of the particular provisions of a state pension program will be required prior to determining the nature and scope of the unmistakable contractual rights, if any, that are created by a given state legislature.

I. General Contract Clause Principles

Although the wording of the Contract Clause appears uncompromising—"No state shall . . . pass any . . . Law

impairing the Obligation of Contracts . . ." [6]—the Supreme Court does not interpret it as an absolute bar on the impairment of either governmental or private contractual obligations. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 21, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92 (1977) (" '[T]he prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' " (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934))). Rather, the Supreme Court has elaborated an analysis under which a court must first ascertain whether a change in state law has resulted in " 'the substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)). Next, the reviewing court must determine whether the impairment is nevertheless justified as "reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25, 97 S.Ct. at 1519. Where the contract allegedly impaired is one created, or entered into, by the state itself, less deference to a legislative determination of reasonableness and necessity is required, because "the State's self-interest is at stake." *Id.* at 26, 97 S.Ct. at 1519; *see also McGrath*, 88 F.3d at 16 (when the state itself is a party, it "must do more than mouth the vocabulary of the public weal in order to reach safe harbor.").

The first step described above can be further broken down into "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 503 U.S. at 186, 112 S.Ct. at 1109. In the instant case, we need not reach the issue of impair-

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[6] U.S. Const. art. I, § 10, cl. 1.

ment or substantiality, because the plaintiffs fail to demonstrate the existence of a contractual relationship protected by the Contract Clause. At the same time that less deference is given to state legislatures when it is the state that wishes to relieve itself of contractual obligations, a clear showing must be made that a state law has created a contractual obligation on the part of the state in the first place. *See Hoffman v. Warwick*, 909 F.2d 608, 614 (1st Cir.1990) ("The Contract Clause is applicable to contracts into which the state enters, but normally state statutory enactments do not of their own force create a contract with those whom the statute benefits.").

II. The Unmistakability Doctrine

In order to deem a state legislative enactment a contract for the purposes of the Contract Clause, there must be a clear indication that the legislature intends to bind itself in a contractual manner. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) ("[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" (quoting *Dodge v. Board of Educ.*, 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937)); *United States Trust Co.*, 431 U.S. at 17-18 n. 14, 97 S.Ct. at 1515-16 n. 14 (a statute may be treated as a binding contract "when the language and the circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state.").

This threshold requirement for the recognition of public contracts has been referred to as the "unmistakability doctrine." *See McGrath*, 88 F.3d at 19 (citing *United States v. Winstar*, —— U.S. ——, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996)). In *United States v. Winstar*, the Supreme

Court traced the history of the unmistakability doctrine from Justice Marshall's opinion in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810), and explained its purpose. Because legislatures should not bind future legislatures from employing their sovereign powers in the absence of the clearest of intent to create vested rights protected under the Contract Clause, courts developed canons of construction disfavoring implied governmental contractual obligations. Thus, " 'neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.' " *Winstar*, —— U.S. at ——, 116 S.Ct. at 2455 (quoting *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1861)). The requirement that "the government's obligation unmistakably appear thus served the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of State authority to limit the subsequent exercise of legislative power." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2455.

In its most recent Contract Clause case holding a state to its obligations under a public contract, the Supreme Court found ample evidence that a promise on the part of the state had been made in a contractual setting, in return for a specific bargained-for benefit, and found that the statutory scheme clearly employed the language of contract. *See United States Trust Co.*, 431 U.S. at 18, 97 S.Ct. at 1515 (involving a legislative covenant between New York and New Jersey and future bondholders where the very "purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal"). In the instant case, we must determine whether the MSRS also evinces a clear intent on the part of the Maine legislature to create contractual rights against the modification of pension benefits.

III. Pension Plans as Contractual Obligations

The law governing the rights of members of public employee retirement plans varies greatly from state to state, and has not been the subject of federal regulation or harmonization. There is no modern Supreme Court case that provides guidance as to the rights public employees have to their pensions. *Pennie v. Reis*, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426 (1889), stands for the proposition that public employee pension programs do not create vested rights against legislative modifications, and thus are gratuities that a state may freely revoke. *See Pennie*, 132 U.S. at 470-71, 10 S.Ct. at 151 (holding California's adjustment of a pension benefit plan for police officers did not constitute deprivation of property without due process). Although this "gratuity" approach has been rejected by most state courts, *Pennie* has never been explicitly overruled. *See generally* 60A Am.Jur.2d, Pensions and Retirement Funds, §§ 1620-29 (discussing the shift away from the gratuity approach toward the contract approach). *Pennie* has, however, been ignored as a precedent, perhaps because its dicta regarding public pension benefits arose in the context of a Due Process claim.

Although only two other circuits have addressed this question, state courts have generally viewed a public pension plan as creating implied-in-fact unilateral contracts. *See McGrath*, 88 F.3d at 17 (collecting cases). The Ninth Circuit in *State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223 (9th Cir.1990), agreed with the Nevada Supreme Court that the " 'better reasoned view' recognizes that non-vested employees have contractual rights in pension plans 'subject to reasonable modification in order to keep the system flexible to meet changing conditions, and to maintain the actuarial soundness of the system.' " 903 F.2d at 1227 (quoting *Public Employees' Retirement Board v. Washoe County*, 96 Nev. 718, 615 P.2d 972 (1980)). Thus the Ninth Circuit in *Keating* concluded that a Nevada law penalizing the withdrawal of pension contributions and thereby altering the previ-

ous law that contained no such penalty, violated the Contract Clause because it did not represent a reasonable modification of the pension plan. The court in *Keating* noted, however, that the state did not dispute that Nevada's statutes providing pensions for public employees created contractual obligations. *See Keating*, 903 F.2d at 1225-26. The Fourth Circuit also ignored the gratuity approach in the course of holding that legislative amendments to a North Carolina public employee disability benefit plan did not violate the Contract Clause because, under relevant state law interpretations of the statute, rights to benefits under the plan did not vest until retirement. *See Kestler v. Board of Trustees of North Carolina Legal Governmental Employees' Retirement Sys.*, 48 F.3d 800, 804 (4th Cir.1995) (no Contract Clause violation where plaintiff was not vested at the time of the effective date of the amendment).

These cases reflect the modern trend among state supreme courts, which is to protect pension rights on the theory that a state's promise of pension benefits represents an offer that can be accepted through the employee's performance—thus, a unilateral, implied-in-fact contract is created that is binding on the state. *See generally* Andrew Mackenzie, "*Spiller v. State:* Determining the Nature of Public Employees' Rights to Their Pensions," 46 Me. L.Rev. 355, 357-59 (1994); Note, John J. Dwyer, " 'Til Death Do Us Part: Pennsylavnia's 'Contract' With Public Employees For Pension Benefits," 59 Temp. L.Q. 553 (1986). There is much disagreement on the details, however, under this unilateral contract approach. One widely held view is that at some point, public employees' contractual rights to pension benefits vest; after vesting, the state is contractually bound to honor its obligation to provide a pension without any further modifications or decreases in overall benefit levels. *See, e.g., Petras v. State Bd. of Pension Trustees*, 464 A.2d 894, 896 (Del. 1983) (rights vest upon completion of minimum service requirement); *Baker v. Oklahoma Fire-*

fighters Pension & Ret. Sys., 718 P.2d 348, 353 (Okla. 1986) (same); *Leonard v. City of Seattle*, 81 Wash.2d 479, 503 P.2d 741, 746 (1972) (en banc) (same); *Sylvestre v. State*, 298 Minn. 142, 214 N.W.2d 658, 666-67 (1973) (rights vest at start of employment); *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965) (en banc) (same as *Sylvestre*). Several states have provisions in their constitutions declaring that vesting occurs at the moment of public employment and barring any legislative modifications that retroactively reduce the accrued benefits of public employees. *See, e.g.*, Alaska Const. art. XII, § 7; Haw Const. art. XVI, § 2; Ill. Const. art. XIII, § 5; Mich. Const. art. IX, § 24; N.Y. Const. art. V, § 7. Several states follow a modified contract approach, which permits some unilateral legislative modifications of pension plans as long as the legislature offsets any new disadvantage with comparable new advantages, as seen from the point of view of the public employee. *See, e.g., Singer v. City of Topeka*, 227 Kan. 356, 607 P.2d 467, 475 (1980); *Betts v. Board of Admin. of the Pub. Employees' Ret. Sys.*, 21 Cal.3d 859, 148 Cal.Rptr. 158, 161, 582 P.2d 614, 617 (1978) (en banc); *Opinion of the Justices*, 364 Mass. 847, 303 N.E.2d 320, 328 (1973). At least two state supreme courts, including Maine's, have declined to use the language of "vesting" in the course of upholding modifications to pension benefits at any time during the employment relationship. *See Spiller v. State*, 627 A.2d 513, 516 (Me.1993); *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803 (1985). The Connecticut Supreme Court in fact rejected the contract model altogether and indicated that public employees have a property interest in pension benefits that may not be arbitrarily confiscated by the state, under the Due Process Clause. *Pineman*, 488 A.2d at 809-810.

Although we have recognized the diversity of contract theories adopted by state courts—in particular the divergence of approaches with regard to when exactly binding rights to a certain level of retirement benefits "vest"—we

have never chosen to adopt a particular approach to *public* pension rights. *See McGrath*, 88 F.3d at 16-18.

In *McGrath*, we noted that, as a general matter, pensions are viewed as "a species of unilateral contracts," although there is considerable disagreement as to when rights in *public* pension plans vest, if at all. *Id.* at 17. But in the course of analyzing a Contract Clause challenge to certain amendments to the Rhode Island public employee retirement system, we eschewed participating in abstract contract theory in favor of performing a close analysis of the statutory provision at issue. Such an approach is wise, because the unmistakability doctrine mandates that we determine whether the challenged legislative enactment evinces the clear intent of the state to be bound to particular contractual obligations. It may well be that the variety of approaches adopted by state supreme courts reflect, in part, differences in the structure of the various state pension programs, and of the intention of the different state legislatures that created them. There is a danger, however, in adopting a theory of pension rights and subsequently forcing a given program to fit under it. Any given theoretical approach will make assumptions regarding the intent of legislatures to be bound, as well as the time at which vesting should occur, which may be contradicted by particular statutory provisions such as, for example, an express reservation of the right to revoke pension benefits.[7] When reviewing a particular enactment, therefore, we must suspend judgment and "proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligations." *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. at 466, 105 S.Ct. at 1452. The district court's decision protects Maine public employees from benefit reduction once employees' rights are "vested." Unfortunately, the line it drew between teachers who had

[7] In *McGrath*, we specifically reserved judgment on the question of whether such express reservations are valid after the point at which pension rights are "vested." 88 F.3d at 19.

and had not completed a minimum service requirement, cannot be justified on the basis of the Maine statute, which nowhere speaks of "vesting" as understood by the district court.

IV. Contractual Rights Under the MSRS

Turning to the MSRS, we ask whether the Maine Legislature has unmistakably evinced the intention to create binding contractual rights. *See Hoffman*, 909 F.2d at 614 (determining whether "language and circumstances" of Rhode Island benefits statute reveal "a legislative intent to create private contractual rights"). Specifically, in light of the plaintiffs' claims, we must ask whether Maine has bound itself not to modify or alter, at any time before the employee's retirement, the level of pension benefits an employee would expect to receive. The statutory language is the primary focus of the inquiry. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. at 466, 105 S.Ct. at 1542.

Under the terms of the MSRS, public employees who have met certain service and age requirements are entitled to receive pensions. At the heart of this case is 5 M.R.S.A. § 17801, which reflects the state's intent to reserve the power to amend the amount of pension benefits, as well as, arguably, the state's intent to create private contractual rights. That is, the State's self-imposed limitations on its legislative power through section 17801 may reasonably serve as an indication of its intent to guarantee pension benefits once they are "due," as well as an obvious reservation of amendment powers with regard to the amount of benefits that are not "due." The parties disagree as to the unmistakable intentions section 17801 represents.

Section 17801 states that "no amendment . . . may cause any reduction in the amount of benefits which would be due a member . . . on the date immediately preceding the effective date of the amendment." Much turns on the meaning of "due." The plaintiff public school teachers argue that benefits are "due" from the moment of em-

ployment, and that this section merely confirms the applicability of a strict implied-in-fact, unilateral contract approach. The State contends that section 17801 is a reservation of the power to alter benefits until the retirement benefits are literally due to be received. The third alternative, not the basic position of either party, is that benefits are "due" if a teacher has completed the statute's initial service requirements, although pension benefits are not yet currently payable.

The Maine Supreme Judicial Court's *Spiller* decision, which deserves our "'respectful consideration and great weight,'" *Romein*, 503 U.S. at 187, 112 S.Ct. at 1110 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685 (1938)), clearly rejects the alternative pressed by the teachers. The court was "unpersuaded by the reasoning of those jurisdictions that have discerned in the statutory language the creation at the time of employment of binding contractual rights." *Spiller*, 627 A.2d at 516. It held that, as to the *Spiller* plaintiffs, none of whom had satisfied the statute's service requirements at the time of the statutory amendment challenged in *Spiller*, "[n]one of the benefits at issue here were due . . . on the effective date of [the] legislation." *Id.*

The question remains, however, whether section 17801 should be read to protect a teacher—and possibly to create contract rights—whenever a teacher satisfies the service requirements even though the teacher is still in active service and no pension is currently payable. Section 17801 does not clearly compel such a reading, since "due" could easily be read to mean currently payable. And such a reading would also arguably conflict with some of the language in *Spiller* (although not its holding) and with the dissent's reading of the majority. *See Spiller*, 627 A.2d at 516 ("By implication, the [statutory] language reserves to future legislatures the power to modify prospective service retirement benefits for employees to whom benefits are not then due"); *id.* at 519 ("Although the

Court does not reach the issue today, its interpretation of section 17801 also undermines the pension benefits of those employees who have met the eligibility conditions for pension benefits but [have not yet retired].") (Wathen, C.J., dissenting).

Even if we treat the statute as unclear and conclude that *Spiller* leaves the issue open, we think that the principle of unmistakability would defeat the teachers' claim that the contract rights are created when service requirements are satisfied. We need not decide whether the statute ever gives rise to a contractual relationship; it is enough to say that it does not clearly do so before a teacher retires, and thus gains an immediate right to the payment of pension benefits. Because there is no attempt here to take away retirees' benefits, there can be no plausible contract clause claim in this case.

The district court reasoned that "due" should be construed as referring to the point at which a member qualifies for retirement benefits. But even if this is a possible reading, we do not think this language could be said to reflect the unmistakable intent of the Maine Legislature, particularly when the legislature could very well have indicated as much. In fact, the MSRS makes no reference to "vesting." As the district court points out, and as the plaintiffs have vigorously argued, there is some evidence indicating that certain legislators wanted to protect vested rights; and that the Maine Legislature, in enacting section 17801, responded to a report that recommended the protection of employees' accrued retirement benefits from retroactive reduction. But the language of section 17801 remains at best ambiguous, and we cannot find that legislature as a whole unmistakably intended to create contract rights at the time that service requirements were satisfied —especially where, as here, it would have been easy to make any such intention crystal clear.

We do not decide today whether, in order to satisfy the unmistakability doctrine, a public pension statute must

explicitly employ the language of contract. Nor need we decide whether Contract Clause principles would apply if Maine sought to reduce pension benefits already "due" to present retirees, a step that would in any case appear to require revision of the present section 17801. To resolve this appeal, we need only conclude that there is no unmistakable intent by the Maine Legislature to create an enforceable private contract right against the modification of the plaintiffs' retirement benefits until they are actually receivable.

As we indicated in *McGrath*, public employment contracts operate in a "special employment environment" requiring recognition of "the states' flexibility vis-a-vis the retirement benefits that it offers public employees." 88 F.3d at 19. Whether the amendments here are wise or justified as a matter of political philosophy is not our concern. As Contract Clause challenges arise, we must look to the language of the pension statutes to determine, as a threshold matter, whether the unmistakability doctrine is satisfied. Here, as it relates to Maine's purported obligation not to alter the benefits of its public teacher employees, it is not. Thus, no violation of the Contract Clause may be found.

With regard to the teacher-plaintiffs' due process claim on cross-appeal, we affirm the decision of the district court, finding no due process violation, for the reasons given in its opinion, extending that reasoning to all plaintiffs. *See* 937 F.Supp. at 58.

CONCLUSION

For the reasons stated in this opinion, the decision of the district court, to the extent that it found the Maine legislative amendments violative of the Contract Clause, is *reversed* in part, and to the extent that it found no constitutional violations, is *affirmed* in part.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MAINE

Civil No. 94-157-P-C

RICHARD M. PARKER, *et al.*,
Plaintiffs,

v.

DAVID S. WAKELIN, *et al.*,
Defendants.

Aug. 1, 1996

MEMORANDUM OF DECISION AND ORDER

GENE CARTER, Chief Judge.

Plaintiffs, the Maine Education Association ("MEA") and a class representing public school teachers throughout the State of Maine ("MSRS members"), bring this action challenging the constitutionality of certain amendments to the Maine State Retirement System ("MSRS" or "Maine Plan") passed by the Maine Legislature in 1993. P.L.1993, ch. 410, pt. L, §§ 12, 13, 28, 31-37 (codified as amended at 5 M.R.S.A. §§ 17001, 17701-B, 17806, 17851, 17852) (collectively "1993 amendments"). Plaintiffs seek declaratory and injunctive relief to block the implementation of the amendments. Second Amended Complaint (Docket No. 23).

This Court has already entertained Defendants' Motion to Dismiss (Docket No. 11), which was granted in part

and denied in part (Docket No. 28). *Parker v. Wakelin*, 882 F.Supp. 1131 (D.Me.1995). After a three-day bench trial and extensive post-trial briefing, the case now comes before the Court for final decision. For the reasons that follow, the Court will find that: (1) the 1993 Amendments, as applied to MSRS members whose benefits had "vested" prior to the effective date of the amendments, violate the Contract Clause of the United States Constitution; (2) the 1993 Amendments, as applied to MSRS members whose benefits had not "vested" prior to the effective date of the amendments, violate no provision of the United States Constitution.

I. FACTS

In 1942, the Maine Legislature created the Maine State Retirement System for two purposes: (1) attracting and keeping qualified employees in state service throughout their productive years and (2) providing benefits upon their retirement, disability, or death. 5 M.R.S.A. § 17050 (1989). Membership in the system is mandatory for all public school teachers, including all Plaintiffs in this case. 5 M.R.S.A. §§ 17001(14), 17651 (1989). All MSRS members are required to make contributions from their salaries to the fund from which benefits are paid. 5 M.R.S.A. § 17701, 17701-A, 17701-B (1989 & Supp. 1995). The State of Maine must also contribute annually to the fund an amount sufficient to discharge its future pension obligations. 5 M.R.S.A. § 17153(1-A)(B) (Supp. 1995). MSRS members, however, do not qualify to receive the service retirement benefits representing the combination of those two contributions until "vesting," *i.e.*, until they meet eligibility requirements either by providing ten years of creditable service if they are not in service at the statutory retirement age or by providing one year of creditable service if they are in service at the statutory retirement age.[1] 5 M.R.S.A. § 17851 (1989 &

[1] Although the term "vesting" is nowhere defined in the plan, it has been used frequently, consistently, and without objection

Supp.1995). If MSRS members end their service prior to vesting, they are entitled only to the return of their contributions with interest. 5 M.R.S.A. § 17705(2).

In 1993, in order to lower the State's budget allocation for its contribution to the fund, legislators enacted certain amendments to the Maine Plan. Defendants' Responses to Plaintiffs' Second Request for Admissions (Plaintiffs' Ex. 501) ¶ 7 ("Defendants' Second Admissions"). The 1993 Amendments operated to the disadvantage of Plaintiffs without providing offsetting advantages to Plaintiffs or to the trust fund generally. Stipulation No. 1 of the Parties (Plaintiffs' Ex. 526) ¶ 5 ("First Stipulation"); *see* Defendants' Second Admissions ¶ 4.

Three of those modifications adversely affected all teachers' pensions: (1) raising the rate of teachers' required contribution from 6.5% of their salary to 7.65%;[2] (2) capping at 5% in each year, and at a total of 10% over the highest 3 years, the salary increase that may be included in calculating teachers' retirement benefits;[3] (3) delaying by six months the first cost-of-living adjustment to teachers' retirement benefit.[4] First Stipulation ¶ 3.

Three other modifications adversely affected only the pensions of those teachers whose right to retirement benefits had not yet vested:[5] (1) increasing teachers' regular

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throughout this litigation to refer to the satisfaction of this requirement for receiving benefits. *E.g., Parker* 882 F.Supp. at 1134 n. 2, 1136, 1139-40; Plaintiffs' Reply Brief at 5 n. 4; Defendants' Post-Trial Brief at 4; Trial Transcript *passim; see* Plaintiffs' Exs. 215A at 11, 215B at 11, 215C at 12.

[2] P.L.1993, ch. 410, pt. L, § 28, *enacting* 5 M.R.S.A. § 17001-B.

[3] P.L.1993, ch. 410, pt. L, § 13, *amending* 5 M.R.S.A. § 17001 (13)(C).

[4] P.L.1993, ch. 410, pt. L, § 31, *amending* 5 M.R.S.A. § 17806(3).

[5] In light of this structure of the 1993 Amendments, the Court will use the term "nonvested member Plaintiffs" to refer to those to whom all 1993 Amendments apply, and "vested member Plain-

retirement age from sixty to sixty-two;[6] (2) increasing the early retirement penalty from 2.25% to 6% of teachers' retirement benefit for each year preceding age 62;[7] (3) eliminating the inclusion of *per diem* payment of up to thirty days of unused sick leave or vacation pay in calculating teachers' retirement benefit.[8] First Stipulation ¶ 4.

At trial, Plaintiffs presented extensive documentary and testimonial evidence relevant to the factual questions raised by its constitutional claims.[9]

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tiffs" to refer to those to whom only the three amendments described in the preceding paragraph above apply.

[6] P.L.1993, ch. 410, pt. L, §§ 33, 35, *amending* 5 M.R.S.A. § 17851(1-A) & (2-A).

[7] P.L.1993, ch. 410, pt. L, § 37, *amending* 5 M.R.S.A. § 17852(3-A).

[8] P.L.1993, ch. 410, pt. L, § 12, *amending* 5 M.R.S.A. § 17001 (13)(B).

[9] Plaintiffs also presented "evidence" relevant to certain *legal* questions raised by its constitutional claims. Defendants have objected to these submissions to the extent that they are offered for the purpose of demonstrating legislative intent. The parties agree that the requirement that a court consider the language and circumstances of the relevant statute to determine whether a contract is formed requires this Court to consider, along with the text of the Maine Plan, its legislative history. *Parker v. Wakelin*, 882 F.Supp. 1131, 1137 n. 8 (D.Me.1995). Those two sources have provided the Court with an indication of legislative intent on that issue that is sufficiently clear that the Court has not needed to resort to the various other more questionable "circumstances" that Plaintiffs' contend might also reflect legislative intent. *See infra* Section II.A.1 (finding legislative intent to create implied-in-fact contract based on text and legislative history). These submissions include:

- The testimony of individual former members of the MSRS Board of Trustees and administrators of the MSRS, whose opinions Plaintiffs' would impute to the legislature. Testimony of Robert Bourgault, March 20, 1996, Trial Transcript at 256-74; Testimony of Patricia M. Dunn, March 19, 1996, Trial Transcript at 172-93; Testimony of Paula Gaudet, March 20, 1996, Trial Transcript at 229-56; Testimony of Philip R.

On the Contract Clause issue of whether the 1993 Amendments would substantially impair the retirement benefits alleged to be contractual, Plaintiffs presented evidence demonstrating that they reasonably relied on, and were induced to serve the State of Maine by, the continued existence of certain retirement benefits.[10] *See infra* Sec-

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Gingrow, March 20, 1996, Trial Transcript at 274-81; Testimony of Claude R. Perrier, March 20, 1996, Trial Transcript at 327-45; Deposition of Jon A. Lund, March 11, 1996. Plaintiffs' Ex. 299C; Deposition of Claude R. Perrier, May 8, 1995, Plaintiffs' Ex. 299B; Deposition of David S. Wakelin, January 17, 1995, Plaintiffs' Ex. 299A.

- The testimony of individual former legislators and members of legislative commissions, whose opinions Plaintiffs' would impute to the legislature. Testimony of Robert Bourgault, March 20, 1996. Trial Transcript at 256-74; Testimony of Harrison L. Richardson, March 20, 1996, Trial Transcript at 214-229.
- MSRS manuals and newsletters, the content of which Plaintiffs would impute to the legislature. Plaintiffs' Exs. 201, 202, 203, 204, 205, 206, 211, 215A, 215B, 215C, 215D, 215E, 222, 223, 224, 225, 226, 228, 230, 258, 259, 270.
- Actuary reports and intra-executive documents which share the common characteristic of never having been addressed to the legislature or individual legislators, but the content of which Plaintiffs nevertheless would impute to the legislature. Plaintiffs' Exs. 170, 214, 218, 401, 402, 409.
- Memoranda from MSRS personnel addressed to individual legislators, the content of which Plaintiffs would impute to the legislature. Plaintiffs' Exs. 113, 172, 220, 227, 290, 298.

That "evidence," admitted at trial *de bene esse*, is superfluous in this case for the purpose of determining legislative intent to create an implied-in-fact contract. Therefore, the Court will not decide whether that evidence may properly be considered for that purpose in another case.

[10] Because the Court will find that a contract has formed for Contract Clause purposes under an implied-in-fact contract theory, it need not, and therefore will not, consider Plaintiffs' quasi-contract theory. *See infra* note 12. Accordingly, the Court admits only for the purpose of determining whether vested member Plaintiffs' contractual rights are substantially impaired (and not for

tion II. A.2. Plaintiff Richard M. Parker testified that MSRS benefits induced him to accept his job as a public school teacher in Maine, and that he relied specifically on the continued existence of the benefits adversely altered by the cap on salary increases calculable for determining annuity payments and by the increased contribution rate. Testimony of Richard M. Parker, March 19, 1996, Trial Transcript at 63, 81-83, 86. Plaintiff Paul L. Hutchins testified to the same inducement and reliance, adding his specific reliance on the cost-of-living increase at 6 months. Testimony of Paul L. Hutchins, March 19, 1996, Trial Transcript at 118-120. Similarly, Plaintiffs Daniel J. Lowell testified that MSRS pension benefits induced him to work for the State and that he specifically relied on benefits reduced by the cap. Testimony of Daniel J. Lowell, March 19, 1996, Trial Transcript at 138, 143-44.

All MSRS members who testified said that no one ever told them that their benefits could *not* be reduced unilaterally by the legislature. *E.g.*, Trial Transcript at 89, 129, 149. No MSRS members who testified, however, said that anyone ever told them that their benefits *could* be reduced unilaterally by the legislature. *E.g.*, Trial Transcript at 89, 117.

On the Contract Clause issue of whether the 1993 Amendments were necessary to the state's public purpose of saving money in a time of fiscal crisis, Plaintiffs presented evidence demonstrating that they were not. *See infra* Section II.A.3. In particular, the testimony of Mr.

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the purpose of determining quasi-contract formation) the evidence of reasonable reliance upon which the factual findings below are based. This evidence includes both individual vested member Plaintiffs' testimony to this effect and the MSRS manuals and newsletters which informed their reliance. Testimony of Richard M. Parker, March 19, 1996, Trial Transcript at 62-95; Testimony of Paul L. Hutchins, March 19, 1996, Trial Transcript at 110-30; Testimony of Daniel J. Lowell, March 19, 1996, Trial Transcript at 131-50; Plaintiffs' Exs. 215A, 215B, 215C, 215D, 215E, 223, 226, 258, 259.

Bent Schlosser indicated specific alternative means available to the legislature for cutting the budget without impinging on teachers' pension benefits. Testimony of Bent Schlosser, March 21, 1996, Trial Transcript at 410-13. Moreover, although the testimony of Defendants' witness, Mr. H. Sawin Millett, provided plausible estimates of the considerable savings to the State issuing from the pension cuts, it provided no indication that those cuts were the only means of generating those savings. *See* Testimony of H. Sawin Millett, March 21, 1996, Trial Transcript at 349-98.

On the Takings Clause issue of the economic impact of the 1993 Amendments on nonvested member Plaintiffs, *see infra* Section II.C., several such Plaintiffs testified. *E.g.*, Testimony of Paula Reed, March 19, 1996, Trial Transcript at 34-49; Testimony of Lana R. Savage, March 19, 1996, Trial Transcript at 49-61; Testimony of Nancy B. Sullivan, March 19, 1996, Trial Transcript at 95-110. The Court finds the expert testimony of actuary Michael E. Gallagher, however, most relevant to this point. Testimony of Michael E. Gallagher, March 20, 1996, Trial Transcript at 299-326. Mr. Gallagher was asked to describe the economic impact of the 1993 Amendments on a hypothetical MSRS member with nine years and ten months of creditable service just before the amendments, who currently has 12 years of creditable service at age 51 and still intends to retire at age 60. *Id.* at 314-15. Mr. Gallagher testified that, under those circumstances, the total value of that member's benefit would be 24%, or $75,000, less than if the 1993 Amendments were not in effect. *Id.* Cross-examination revealed, however, that an additional two years of work and contribution, from ages sixty to sixty-two, would cut the devaluation by more than half, down to $30,000, reducing her monthly annuity payment by only $100. *Id.* at 322-326.

II. DISCUSSION

Plaintiffs challenge the constitutionality of the 1993 Amendments on three separate grounds: (1) they violate the Contract Clause of article I, § 10 (Count I); (2) they violate the Due Process Clause of the Fourteenth Amendment (Count II); (3) they violate the Takings Clause of the Fifth Amendment (Count II). Plaintiffs will prevail only in their claim that the 1993 Amendments violate the Contract Clause as applied to vested MSRS members.

A. Contract Clause (Count I)

The Contract Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. Since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-39, 3 L.Ed. 162 (1810), courts have regularly applied the Clause to contracts between states and private parties. Analysis under the Contract Clause proceeds in four steps. The Court must inquire: (1) whether there is a contractual relationship; (2) whether a change in law impairs that contract; (3) whether that impairment is substantial; (4) whether that substantial impairment is reasonable and necessary to serve an important public purpose. *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109-10, 117 L.Ed.2d 328 (1992); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92 (1977); *McGrath v. Rhode Island Retirement Bd.*, 88 F.3d 12, 16-17 (1st Cir.1996). When the state is a party to the contract at issue, the court must undertake the fourth inquiry at a heightened level of scrutiny " 'because the State's self-interest is at stake.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 n. 14, 103 S.Ct. 697, 705 n. 14, 74 L.Ed.2d 569 (1983) (quoting *United States Trust Co.*, 431 U.S. at 26, 97 S.Ct. at 1519-20); *see Nat'l Educ. Ass'n-Rhode Island v. Retirement Bd. of Rhode Island Employees' Retirement Sys-*

tem, 890 F.Supp. 1143, 1151 (D.R.I.1995) (characterizing test as one of intermediate scrutiny).

The Court will conclude :(1) that the MSRS members who had met the service requirement qualifying them for pension benefits, i.e., those who were "vested," as of July 1, 1993 then had a contractual relationship with the State, but that MSRS members who were not vested as of July 1, 1993 did not then have a contractual relationship with the State; (2) that the 1993 Amendments reducing the benefits of vested members substantially impaired their contract with the State; [11] (3) that the 1993 Amendments reducing the benefits of vested members were not necessary to serve the purpose of resolving Maine's fiscal crisis. Accordingly, the Court will declare that the 1993 Amendments violate the Contract Clause as applied to vested members and so will enjoin the application of those Amendments to those members.

1. Is there a Contract?

Whether a statute gives rise to a contractual relationship is a question of federal constitutional law. *Romein*, 503 U.S. at 186, 112 S.Ct. at 1109-10. To the extent that the determination of this federal question involves the interpretation of state law, however, it is appropriate to "accord respectful consideration and great weight to the views of the State's highest court." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685 (1938).

Analysis of this question must begin with the well-established proposition "that absent some clear indication that the legislature intends to bind itself contractually, the

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[11] The Court has combined the second and third elements of the analysis because there is no dispute as to the second, namely, whether the 1993 Amendments constitute an impairment at all. *See* Defendants' Responses to Plaintiffs' Second Request for Admissions (Plaintiffs' Ex. 501) ¶ 4.

presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quoting *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937)). Plaintiffs may overcome this presumption by demonstrating that "the language and circumstances [of the statute] evince a legislative intent to create private rights of a contractual nature enforceable against the state." *United States Trust Co.*, 431 U.S. at 17 n. 14, 97 S.Ct. at 1515 n. 15; *Hoffman v. City of Warwick*, 909 F.2d 608, 614 (1st Cir.1990). The statutory language itself, however, constitutes the primary object of this inquiry. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 466, 105 S.Ct. at 1451-52.

This Court will apply the common law of contracts to determine whether a contract has formed between Plaintiffs and the State for Contract Clause purposes.[12] *See, e.g., Nat'l Educ. Ass'n-Rhode Island*, 890 F.Supp. at 1156-59 (applying "traditional contract law principles"). According to those principles, three familiar elements are typically required for the formation of a contract: offer, acceptance, and consideration. *See Restatement (Second) of Contracts* §§ 17(1), 22(1) (hereinafter *"Restatement"*); *Estes v. Smith*, 521 A.2d 682, 684 (Me.1987). An offer is defined as "the manifestation of willingness to enter

[12] Because this Court will decide that, under the common law of contracts, the statutory language and circumstances of the Maine plan (constituting an offer), combined with the conduct of member Plaintiffs (constituting acceptance and consideration, but not here considered for legislative intent), gives rise to an implied-in-fact contract for Contract Clause purposes, this Court need not consider the theories of quasi-contract and trust that Plaintiffs also advance to establish the existence of a contract for Contract Clause purposes. Accordingly, this Court will not consider Plaintiffs' exhibits to the extent that they are offered in support of those theories.

into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Restatement* § 24. Offers may be express or implied. Arthur L. Corbin, *Corbin on Contracts* § 1.19, at 55 (Joseph M. Perillo rev. ed. 1993). An offeree may accept the offer by "a manifestation of assent to the terms thereof . . . in a manner invited or required by the offer." *Restatement* § 50; *Ouellette v. Bolduc*, 440 A.2d 1042, 1045 (Me.1982). To render an offeror's promise enforceable, an offeree must provide consideration, which is some "performance or return promise . . . sought by the promisor in exchange for his promise." *Restatement* § 71(2); *Whitten v. Greeley-Shaw*, 520 A.2d 1307, 1310 (Me.1987). When the offeror seeks a performance rather than a return promise, the offeror proposes a unilateral contract. Corbin, *Corbin on Contracts* § 1.23, at 89; *Chenard v. Marcel Motors*, 387 A.2d 596, 600 (Me.1978).

In light of these principles, it should come as no surprise that most contemporary public pension plans have been held to give rise to implied-in-fact unilateral contracts within the reach of the Contract Clause. *McGrath*, 88 F.3d at 16-18; 60A Am.Jur.2d, Pensions and Retirement Funds, § 1620, at 950 (1988). A legislature's manifestation, through the language and circumstances of the pension statute, of its intent to enter a bargain with its employees, whereby the state provides them pension benefits in exchange for a long period of their loyal service and monetary contribution, establishes the existence of an offer. *E.g., Nat'l Educ. Ass'n-Rhode Island*, 890 F.Supp. at 1157. State employees' performance of that service and contribution for the period required for eligibility constitutes both acceptance (because it manifests their assent to the terms of the state's offer) and consideration (because it represents the performance sought by the state in exchange for its promise of benefits). *Id.* at 1158-59. Thus, an implied-in-fact unilateral contract implicating the

Contract Clause is formed. *See Brand*, 303 U.S. at 100, 58 S.Ct. at 446 ("a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of article I, § 10.")

Although public pension plans generally share this contractual character, they vary widely as to when in the employment relationship the benefits they provide become contractual. *McGrath*, 88 F.3d at 17-18; *Spiller v. State*, 627 A.2d 513, 516 & n. 10 (Me.1993). Careful review of the relevant cases reveals that two main factors account for the variation among courts on this point. The first is variation in the language and circumstances of each state's pension statute.[13] The second, and perhaps more often determinative, is variation in the theory of pension contracts that each court applies. *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803, 807-10 (1985) (surveying and choosing among various pension contract theories); *Singer v. City of Topeka*, 227 Kan. 356, 607 P.2d 467, 473-75 (1980) (same). Two cases illustrate in an especially clear and relevant way how each of these two factors can affect the resolution of this issue.

In the recent case of *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12 (1st Cir.1996), the Court of Appeals for the First Circuit discussed the effect of statutory language that expressly reserves to a state legislature the power to amend or terminate its public pension plan. *Id.* at 17-19. The court noted that, under the common law of contracts generally, when an offeror expressly reserves the power to revoke an offer to enter a unilateral contract until performance is complete, the offer is illusory

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[13] To the extent that the questions of whether a contract is formed are necessarily intertwined, it would seem particularly appropriate that courts consider primarily the language, as well as the circumstances, of the statute. *See United States Trust Co.*, 431 U.S. at 17 n. 14, 97 S.Ct. at 1515.

and may not yet give rise to a contract. *Id.* at 17-18 (citing *Restatement* § 45, cmt. b). The court added that, under the common law of pension contracts particularly, however, such a revocation power is effective only until "an employee's rights under the plan vest," the time at which "an employee fulfills the service requirements entitling him or her to retirement benefits under a pension plan." *Id.* at 18-19. The court nevertheless expressed doubt regarding whether this limitation on an employer's reserved power to revoke pension benefits applies with the same force to state pension plans, since this limitation might constitute an unprecedented infringement of state sovereignty. *Id.* at 19; *see also Nat'l R.R. Passenger Corp.*, 470 U.S. at 467 & n. 22, 105 S.Ct. at 1452 & n. 22 (discussing unlimited effect of express reservation *by Congress* of revocation power).

In *Petras v. State Board of Pension Trustees,* 464 A.2d 894 (Del.1983), the Supreme Court of Delaware, in deciding the issue of when its state pension plan created enforceable contractual rights to benefits exemplified a widely held theory of pension contracts. The plan at issue was typical of many contemporary plans in that it contained provisions that: extended benefits to members; predicated eligibility for those benefits upon the completion of a minimum period of service; and required contributions of members.[14] *Id.* at 895. The court affirmed the holdings of earlier Delaware court cases that this statutory scheme gave rise to enforceable contractual rights, but only "upon fulfillment of the eligibility requirements." *Id.* at 869. Correspondingly, "no contract exists between an employee and the State, concerning the state pension plan, unless and until the pension vests." *Id.* The court concluded, therefore, that "pension rights may be changed at any time before they become vested." *Id.*

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[14] There is no indication that the plan contained any statutory provision expressly reserving the power to revoke benefits.

The pension theory embodied in the *Petras* decision has been applied in other jurisdictions as well. *Petras,* 464 A.2d at 896 (collecting cases); *Baker v. Oklahoma Firefighters Pension & Ret. Sys.*, 718 P.2d 348, 352 (Okla. 1986); *see Singer,* 607 P.2d at 474-75. Upon adopting the *Petras* view of pension contracts, the Supreme Court of Oklahoma concisely articulated the compelling theoretical and practical reasons for doing so:

> Viewing the contract between the state and its employees as coming into existence at the point of eligibility allows the necessary flexibility in fiscal planning which must be given to the Legislature. This view also avoids the necessity of engaging in the tortuous applications of contract law which other jurisdictions have applied in finding that rights, which they have characterized as being in existence, [nevertheless] remain subject to unilateral modifications.[15] This view also realistically acknowledges the contingent nature of the relationship as it ripens into a contractual obligation on the part of the state.

Baker, 718 P.2d at 352. This theory of pension contracts, whereby benefits vest and become enforceable only upon satisfaction of service requirements for eligibility, has been described elsewhere as a "deferred compensation" theory. *McGrath v. Rhode Island Retirement Board,*

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[15] Along the same lines, the Supreme Court of Connecticut has criticized the "limited vesting" theory of pension contracts, *e.g., Public Employees' Retirement Board v. Washoe County,* 96 Nev. 718, 615 P.2d 972, 974-75 (1980), whereby pension benefits become contractual on acceptance of employment but nevertheless remain subject, pursuant to an implied term of that contract, to "reasonable modification" by the employer.

> It makes little sense to strain established rules of statutory interpretation to find a contract where the requisite express legislative intent is lacking, only to strain other equally well settled legal principles to allow for necessary unilateral modification by the state.

Pineman v. Oechslin, 195 Conn. 405, 488 A.2d 803, 809 (1985).

906 F.Supp. 749, 760 n. 1 (D.R.I.1995) (citing *Nat'l Educ. Ass'n-Rhode Island*, 890 F.Supp. at 1156), *aff'd*, 88 F.3d 12 (1st Cir.1996).

It is within this legal context that this Court will determine whether and when the Maine State Retirement System creates a contract with any of the present Plaintiffs for Contract Clause purposes.

This Court holds that, at some point in the employment relationship between the State of Maine and MSRS members, the Maine Plan creates a contract that binds the State to provide MSRS members with certain retirement benefits. The Maine Plan contains all the elements which have been found almost uniformly to give rise to an implied-in-fact unilateral pension contract. The pension statute contains provisions which manifest the State of Maine's willingness to enter into a bargain with Maine State employees, whereby retirement benefits would be exchanged for ten years of loyal service and monetary contribution, in a way that justified those employees in believing their acceptance is invited. *See* 5 M.R.S.A. §§ 17050, 17151, 17851. MSRS members both manifest their assent to (and, therefore, acceptance of) this offer and provide the consideration [16] sought by the State by performing ten years of service and contribution to the system. In this way, the Maine State Retirement System creates a contractual relationship between the State of Maine and MSRS members.

The question remains of when in the employment relationship those enforceable contract rights arise. Consist-

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[16] The so-called "Towne Report," which was adopted by the Legislative Recess Committee to which it was submitted and, in turn, by the entire Maine Legislature itself, indicated that "[p]ension payments are generally deemed as made *in consideration* of past services, injury or loss sustained, merit, poverty, etc." Report to Legislative Recess Committee on Maine State Retirement System and Social Security Coverage, April 8, 1954, at 17 (Plaintiffs' Ex. 207) (emphasis added) (hereinafter "Towne Report").

ent with the method of other courts, this Court will make this determination by considering the language and circumstances of any relevant statutory provisions and by applying the most appropriate theory of pension contracts.

The language and circumstances of 5 M.R.S.A. § 17801 bear particular relevance to the question of when the Maine Plan creates contractual rights to retirement benefits. That section provides:

> No amendment to this Part may cause any reduction in the amount of benefits which would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions, and the provisions of this part on the date immediately preceding the effective date of the amendment.

5 M.R.S.A. § 17801. This Court discerns in this provision two statements of legislative intent pertinent to the present issue. First, the legislature intends to be bound, as a term of the implied pension contract whose existence is established *supra*, not to reduce a member's benefits *after* they become "due to a member." Second, the legislature intends *not* to be bound not to reduce a member's benefits *before* they become "due to a member." *Accord Spiller*, 627 A.2d at 516 (reading § 17801 to reserve right to modify benefits not then due). This implied reservation of the power to revoke, as to members whose benefits are not yet "due," the offer giving rise to the contract renders that offer illusory as to those members. *See McGrath*, 88 F.3d at 17-18. These two facets of § 17801 indicate legislative intent to create enforcement contract rights to benefits only when they become "due to a member."

It is necessary to determine, then, when in the employment relationship benefits become "due to a member." The term "due" is nowhere defined in the Maine Plan. It is clear, however, that the phrase "due to a member" cannot mean "due to a retiree to whom benefits are currently

payable" because retirees are, by definition, not members. 5 M.R.S.A. § 17654(2). Nor is it legitimate to characterize as "due to a member" benefits for which the member is not even eligible. *Accord Spiller*, 627 A.2d at 516 (finding no benefits "due to" plaintiff members, none of whom had met eligibility requirements). Correspondingly, once a member has met eligibility requirements for benefits, it becomes possible, even plausible, to describe those benefits as "due to a member." Moreover, the legislative history of § 17801 indicates that the provision was initially recommended and ultimately passed "to insure the continuation of *presently vested rights*." Final Report of the Committee on Veterans and Retirement on its Study of the Maine State Retirement System at 4 (January 1975) (Plaintiffs' Ex. 105B) (emphasis added). Therefore, this Court concludes that the language and circumstances of 5 M.R.S.A. § 17801 indicate that retirement benefits become enforceable in contract under the Maine Plan when those benefits are "due to a member," here understood as "vested in a member," where vesting occurs upon completion of the service requirement for eligibility.

The theory of pension contracts which this Court finds most appropriate to the Maine Plan yields the same result. That theory, embodied in the *Petras* decision discussed *supra*, provides that pension benefits become enforceable in contract only upon vesting, defined as satisfaction of eligibility requirements. The Court considers this theory applicable to the Maine Plan for three reasons. First, the Maine Plan contains provisions substantially similar to those in *Petras*, in that both plans extend benefits to members, predicate eligibility for those benefits on the completion of a service requirement, and require monetary contribution. Second, the theoretical and practical strengths of the *Petras* theory, as explicated in *Baker*, apply with no less force to this case. Third, the *Petras* theory has been fairly characterized as a "deferred compensation" theory of pension contracts, and the legislative history of the Maine Plan contains frequent references to an under-

standing of the system as one of "deferred compensation." *See, e.g.*, Towne Report at 17-19. Therefore, the theory of pension contracts best suited to the circumstances of this case also indicates that pension benefits under the Maine Plan become contractual only upon vesting.

The language and circumstances of the relevant provision of the Maine Plan, as well as the appropriate theory of pension contracts, then, both point to the same conclusions with respect to the present Plaintiffs.

First, the Court holds that MSRS members not vested on the effective date of the 1993 Amendments do not have enforceable contract rights to the benefits reduced by the those amendments. Under the applicable theory of pension contracts, members of a pension plan have no contractual rights to benefits until vesting. Even if it were somehow more appropriate to apply a different theory of pension contracts under which the implied offer or benefits is viewed as extended to nonvested member Plaintiffs, the reservation in § 17801 of the power to reduce benefits not then "due to a member" renders the offer of those benefits illusory as to those Plaintiffs. *McGrath*, 88 F.3d at 17-18. Finally, although § 17801 indicates the legislature's intent, as a term of its implied-in-fact contract with members, not to reduce benefits then "due to a member," the benefits reduced by the 1993 Amendments were not "due to" member Plaintiffs not presently vested on the effective date of those amendments.

Second, the Court holds that MSRS members vested on the effective date of the 1993 Amendments have enforceable contract rights to the benefits reduced by those amendments. Once again, under the applicable theory of pension contracts, members of a pension plan acquire contractual rights to benefits upon vesting. Moreover, the legislature's reservation in § 17801 of the power to reduce benefits not then "due to a member" renders the offer of those benefits illusory only as to nonvested members, not

as to vested members.[17] Perhaps most important of all, § 17801 indicates the legislature's intent, as a term of its implied-in-fact contract, not to reduce benefits then "due to a member," and the benefits reduced by the 1993 Amendments were "due to" member Plaintiffs presently vested on the effective date of those amendments.

Therefore, because Plaintiffs not presently vested before the effective date of the 1993 Amendments have no enforceable contract rights to the benefits reduced by those amendments, their claim under the Contract Clause must fail. Correspondingly, because Plaintiffs presently vested before the effective date of the 1993 Amendments do have enforceable contract rights to the benefits reduced by those amendments, their claim under the Contract Clause may proceed to the next stage of analysis.

2. *Is the Contract Substantially Impaired?*

To establish a violation of the Contract Clause, those Plaintiffs with contractual rights in the benefits modified by the 1993 Amendments must yet demonstrate that those modifications "substantially impair" those rights. *Romein*, 503 U.S. at 186, 112 S.Ct. at 1109-10. Although guidance from the Supreme Court on this issue is sparse, two rules relevant to this case have emerged at the appellate level. First, a contract with a state is substantially impaired if the legislature adversely modifies a term that induced the plaintiff to enter the contract and on whose continued existence the plaintiff reasonably relies. *Baltimore Teachers' Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1018 (4th Cir.1993); *see Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. at 704 (citing *El Paso v. Simmons*, 379 U.S. 497, 515, 85 S.Ct. 577, 587, 13 L.Ed.2d 446 (1965)). Second, a pension contract with a state is not substantially impaired if the

[17] The effect of the legislature's revocation power may also not extend to vested members as a member of the common law of pension contracts. *See McGrath*, 88 F.3d at 17-19.

legislative modification "bear[s] some material relationship to the purpose of the pension system and its successful operation; and any disadvantage to employees [is] accompanied by comparable new advantages." *State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1227 (9th Cir.1990).[18]

The Court finds that the three 1993 Amendments applicable to vested member Plaintiffs substantially impair their contract with the State of Maine. Once again, those amendments would: (1) increase the employee contribution rate from 6.5% to 7.65%; (2) cap the salary increases that may be included in the calculation of the

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[18] This Court is aware that the test outlined above is commonly labeled the "reasonable modification" test. *E.g., Public Employees' Retirement Board v. Washoe County*, 96 Nev. 718, 615 P.2d 972, 974-75 (1980). For three reasons, however, this Court declines to apply that label to this test in the context of this case. First, using the phrase "*reasonable* modification" to describe a test that gives content to "substantial impairment" risks its confusion with, and misapplication as, the next step in the analysis (whether the substantial impairment is "*reasonable* and necessary to serve an important public purpose"). *See, e.g.*, Plaintiffs' Reply Brief (Docket No. 58) at 11; *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910, 915 (1982). Second, using the phrase "reasonable modification" to describe this test risks its confusion with the contract term both that state courts commonly imply in state pension contracts as a matter of state law, and from which the test originally derives. By contrast, this Court reads *Keating* to say that, as a matter of federal law, a contract modification is not a "substantial impairment" for Contract Clause purposes if it meets the requirements of this test, regardless of whether the pension contract in question contains such an implied term as a matter of state law. *Keating*, 903 F.2d at 1227. Third, the test better helps define the ordinary meaning of the phrase "substantial impairment." A modification can hardly be described as an impairment, least of all a substantial one, if it creates benefits to offset its burdens. This is especially so when the purpose of such a modification is to enhance the successful operation of a pension system. These two factors, then, describe particularly well what a "substantial impairment" is not, less well what a "reasonable modification" is.

annuity benefit; and (3) postpone for six months the first cost-of-living increase in the annuity benefit after retirement. First Stipulation ¶ 3. None of these impairments either bear any material relationship to the successful operation of a pension plan or create benefits to offset the burdens they impose. Testimony at trial also reveals both that the benefits impaired by these amendments induced vested member Plaintiffs to enter their contract with the State of Maine, and that those Plaintiffs reasonably relied on the continued existence of those benefits. *See* Testimony of Richard M. Parker, Paul L. Hutchins, and Daniel J. Lowell, cited *supra* Section I. Moreover, Courts have commonly found an increase in the rate of contribution in particular to represent a substantial impairment. *Marvel v. Dannemann*, 490 F.Supp. 170, 171 (D.Del. 1980); *Pennsylvania Fed'n of Teachers v. Sch. Dist. of Philadelphia*, 506 Pa. 196, 484 A.2d 751, 753 (1984); *Singer*, 607 P.2d at 476-77. Therefore, the 1993 Amendments substantially impair the contractual rights of vested member Plaintiffs to the retirement benefits at issue.

3. Is the Substantial Impairment Reasonable and Necessary to Serve an Important Public Purpose?

Even though the State's impairment of vested Plaintiffs' rights to retirement benefits is substantial, it may yet be permissible under the Contract Clause "if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25, 97 S.Ct. at 1519. The Court need not decide whether the present substantial impairment is "reasonable," nor whether the public purpose it serves is "important," because the Court finds that it is not "necessary" to that purpose. It is undisputed that the State's purpose in reducing pension benefits was to help alleviate the State's fiscal crisis. Persuasive expert testimony presented at trial, which described various means of cutting expenditures to serve this purpose without impairing Plaintiffs' contract rights, defeats Defendants' claim that the impairment was necessary to serve

that purpose. *See* Testimony of Bent Schlosser, cited *supra* Section I. Therefore, the State's substantial impairment of vested Plaintiffs' contractual benefits constitutes a violation of the Contract Clause.

B. Due Process Clause (Count II)

Plaintiffs [19] claim that the 1993 Amendments violate the substantive aspect of the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend XIV, § 1. To withstand such a challenge, the 1993 Amendments need only be rationally related to a legitimate state purpose. *Parker v. Wakelin*, 882 F.Supp. 1131, 1138 (D.Me. 1995); *see Williamson v. Lee Optical*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955); *Pineman v. Fallon*, 842 F.2d 598, 601 (2d Cir.1988). The Court finds the 1993 Amendments rationally related to the legitimate state purpose of reducing expenditures in a time of fiscal crisis. *See Spiller*, 627 A.2d at 521 (Wathen, C.J., and Glassman, J., dissenting). Therefore, the 1993 Amendments, as applied to nonvested member Plaintiffs, do not violate the Due Process Clause.

C. Takings Clause (Count II)

Plaintiffs also claim that the 1993 Amendments violate the Takings Clause of the Fifth Amendment. U.S. Const. amend V. To determine whether legislation effects an unconstitutional taking of property,[20] the Court considers

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[19] Because the Court has determined that application of the 1993 Amendments to vested member Plaintiffs violates the Contract Clause, it is unnecessary to decide whether that same application also violates the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment. It remains necessary, however, to determine whether the application of the 1993 Amendments to nonvested member Plaintiffs violates either of those other two constitutional provisions. Therefore, Sections II.B. and II.C. will pertain only to *nonvested* member Plaintiffs.

[20] The Court assumes, without deciding, that nonvested Plaintiffs' interest in their pension benefits constitutes "property" for Takings Clause purposes.

three factors of " 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166 (1986) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978)).

The Court finds that the 1993 Amendments, as applied to nonvested Plaintiffs, do not effect a taking of their alleged property because none of these three factors so indicate. First, although the economic impact on nonvested Plaintiffs, as illustrated by the near-worst-case scenario addressed by an expert actuary at trial, is "significant," *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 976 (1st Cir.1993), it is neither "severe," *Pineman v. Fallon*, 842 F.2d 598, 602 (2d Cir.1988), nor of a sort that "extinguish[es] a fundamental attribute of ownership," *Agins v. Tiburon*, 447 U.S. 255, 262, 100 S.Ct. 2138, 2142, 65 L.Ed.2d 106 (1980). *See* Testimony of Michael E. Gallagher, cited *supra* Section I. Second, the 1993 Amendments do not interfere to any extent with investment-backed expectations of nonvested members because, without contractual rights, nonvested members have no investment-backed expectations subject to interference. *Pineman*, 842 F.2d at 603. Third, the 1993 Amendments constitute neither a permanent physical invasion of their benefits nor an elimination of the economic value of their benefits. *Washington Legal Foundation*, 993 F.2d at 975 (*citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-16, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992)). Instead, they amount only to an ordinary "adjustment of the benefits and burdens of economic life." *Pineman*, 842 F.2d at 602 (characterizing change in pension plan that increases retirement age) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2892-93, 49

L.Ed.2d 752 (1976)). Therefore, this Court finds no unconstitutional taking in the application of the 1993 Amendments to nonvested member Plaintiffs.

III. CONCLUSION

Accordingly, it is hereby *ORDERED* that those 1993 Amendments to the Maine State Retirement System, P.L. 1993, ch. 410, pt. L, §§ 13, 28, 31, that purport to apply to the retirement benefits of MSRS members who were "vested" prior to the effective date of those amendments be, and they are hereby *DECLARED*, to violate the Contract Clause as applied to those members. It is further *ORDERED* that application of those amendments to "vested" MSRS members be, and it is hereby, *ENJOINED*. Counsel for the Plaintiffs shall submit to the Court, within ten (10) days from the date of the docketing of this order, a proposed order of judgment for consideration by the Court which will fully implement the decision set forth above.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2225, 96-2226, 96-2227 and 96-2228

RICHARD M. PARKER, *et al.*,
Plaintiffs, Appellees,
Cross-Appellants,

v.

DAVID S. WAKELIN, *et al.*,
Defendants, Appellants,
Cross-Appellees.

ORDER OF THE EN BANC COURT
BEFORE TORRUELLA, *Chief Judge,*
SELYA, BOUDIN, STAHL and LYNCH, *Circuit Judges.*

Entered: October 17, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court En Banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By The Court

PHOEBE MORSE
Clerk

By: /s/ Janice M. O'Neil
Chief Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Title 5 of the Maine Revised Statutes provides, in pertinent part:

§ 17001. Definitions

As used in this Part, unless the context otherwise indicates, the following terms have the following meanings.

. . . .

13. Earnable compensation. "Earnable compensation" means salaries and wages paid for services rendered in an employment position, subject to the following inclusions, exclusions and limitations.

A. "Earnable compensation" includes:

(1) Workers' compensation benefits;

(2) Maintenance, if any;

(3) Any money paid by an employer to a 3rd party under a tax sheltered annuity contract or a deferred compensation plan for the future benefit of an employee provided that the money is not derived from amounts excluded from earnable compensation by paragraph B; and

(4) Pick-up contributions.

B. "Earnable compensation" does not include:

(1) For any member who has 10 years of creditable service by July 1, 1993 or who has reached 60 years of age and has been in service for a minimum of one year immediately before that date, payment for more than 30 days of unused accumulated or accrued sick leave, payment for more than 30 days of unused vacation leave or payment for more than 30 days of a combination of both;

(2) For any member who is not covered by subparagraph (1), payment for any unused accumulated or accrued sick leave or payment for any unused vacation leave;

(3) Any other payment that is not compensation for actual services rendered or that is not paid at the time the actual services are rendered; or

(4) Teacher recognition grants paid pursuant to Title 20-A, section 13503-A.

A payment for unused sick leave or unused vacation leave may not be included as part of earnable compensation unless it is paid upon the member's last termination before the member applies for retirement benefits.

C. Notwithstanding the other provisions of this subsection, for the purposes of determining average final compensation, "earnable compensation" does not include any increase that exceeds the prior year's earnable compensation by more than 5% or that results in a total increase of more than 10% during the 3-year period used in the calculation of average final compensation, unless the cost of the additional actuarial liability arising from the excess increase is paid by the employer as provided in section 17154. Any payment made under paragraph B, subparagraph (1) must be included in determining the amount of increase in the year in which the payment is made. This paragraph does not apply to excess increases resulting from compensation paid prior to July 1, 1993, from compensation paid in accordance with an individual employment contract executed prior to July 1, 1993 or a collective bargaining agreement executed or ratified in its final form by final vote of one party to the agreement prior to July 1, 1993 for the initial term of that contract or agreement or from other action by the governing body of a school ad-

ministrative unit in effect on July 1, 1993. This paragraph does not apply to increases in compensation of state employees during fiscal year 1993-94 and fiscal year 1994-95. In all circumstances in which this paragraph does not apply to earnable compensation of state employees and teachers, the provisions of this paragraph that were in effect prior to June 30, 1993 apply. This paragraph does not apply to earnable compensation of employees of participating local districts.

D. For a teacher who is eligible for participation in the retirement system who is on a leave of absence while serving as President of the Maine Teachers Association, "earnable compensation" means the amount that the teacher would have earned if the teacher had remained in a teaching position.

E. "Earnable compensation" of a part-time, seasonal or temporary employee is the sum of amounts computed under paragraphs A, B, C and D adjusted to reflect the wages or salary that the member would have been paid if the member had been employed, at the member's rate of pay, for the number of days or hours that a permanent full-time employee of the same employer would have been employed.

F. For a teacher who, as provided by subsection 42, serves as president of a recognized or certified bargaining agent representing teachers for which released time from teaching duties for performance of the functions of president has been negotiated in a collective bargaining agreement between the collective bargaining agent and the teacher's school administrative unit, "earnable compensation" includes compensation paid for the release time, except that the amount of that compensation included in "earnable compensation" may not be more than the compensation that the teacher would have been paid had the teacher remained that same amount of time in the teacher's teaching position.

14. Employee. "Employee" means:

A. For purposes of this chapter, a state employee, including any person serving during any probationary period required under the Civil Service Law and rules of the Civil Service Appeals Board, a teacher or a participating local district employee;

B. For purposes of chapter 423, a state employee, including any person serving during any probationary period required under the Civil Service Law and rules of the Civil Service Appeals Board, or a teacher; or

C. For purposes of chapter 425, a participating local district employee.

. . . .

§ 17050. Legislative intent

It is the intent of the Legislature to encourage qualified persons to seek public employment and to continue in public employment during their productive years. It is further the intent of the Legislature to assist these persons in making provision for their retirement years by establishing benefits reasonably related to their highest earnings and years of service and by providing suitable disability and death benefits.

* * * *

§ 17151. Legislative findings and intent

1. Findings. The Legislature finds that the State owes a great debt to its retired employees for their years of faithful and productive service.

A. Part of that debt is repaid by the benefits provided to retirees through the Maine State Retirement System.

B. Retirees, who depend heavily on these benefits, and current employees, who will one day retire and

receive benefits, are concerned about the financial viability of the retirement system.

2. Intent. It is the intent of the Legislature that there must be appropriated and transferred annually to the retirement system the funds necessary to meet the system's long-term and short-term financial obligations based on the actuarial assumptions established by the board upon the advice of the actuary, except that for fiscal year 1991-92 the annual appropriation must be $73,500,000 less than the amount that would otherwise be applied toward the unfunded liability of the system. It is the intent of the Legislature that the amount of the reduction, together with the balance of the unfunded liability in the retirement system on July 1, 1993, must be placed on a 27-year amortization schedule. Funds that have been appropriated must be considered assets of the retirement system.

A. The goal of the actuarial assumptions is to achieve a fully funded retirement system.

B. The retirement system's unfunded liability for persons formerly subject to the Maine Revised Statutes of 1944, chapter 37, sections 212 to 220 must be repaid to the system from annual appropriations over the funding period of the retirement system.

C. This section may not be construed to require the State to appropriate and transfer funds to meet the obligations of participating local districts to the retirement system.

* * * *

§ 17153. Board of trustees

1-A. Actuarially sound basis. The board shall calculate the funds necessary to maintain the retirement system on an actuarially sound basis, including the unfunded liability arising from payment of benefits for which contributions were not received and shall transmit those calculations to the State Budget Officer as required by chapter 149.

A. For benefits applicable to state employees, teachers or participating local district employees that are established through collective bargaining, the board shall apply the funding methods and assumptions adopted by the board pursuant to this subsection.

B. The Legislature shall appropriate and transfer annually those funds the board determines to be necessary under this subsection to maintain the retirement system on an actuarially sound basis, except that for fiscal year 1991-92 the annual appropriation must be $73,500,000 less than the amount that would otherwise be applied toward the repayment of the unfunded liability of the system.

C. This subsection may not be construed to require the State to appropriate and transfer funds to meet the obligations of participating local districts to the retirement system.

2. Trustee of funds. The members of the board shall be the trustees of the several funds created by this Part.

3. Investment of funds. The board may cause the funds created by this Part to be invested and reinvested in accordance with the standards defined in Title 18-A, section 7-302, subject to periodic approval of the investment program by the board.

4. Prohibitions. In addition to the limitations of section 18 and except as otherwise provided, no trustee and no employee of the board of trustees may:

A. Have any direct interest in the gains or profits of any investment made by the board;

B. Directly or indirectly, for himself or as an agent, in any manner, use the gains or profits of any investment made by the board except to make whatever current and necessary payments are authorized by the board; or

C. Become an endorser, surety or obligor for money loaned to or borrowed from the board.

* * * *

§ 17651. Mandatory membership

All employees shall become members of the retirement system as a condition of their employment.

* * * *

§ 17654. Cessation of membership

A member ceases to be a member of the retirement system if the member:

1. Withdrawal. Withdraws accumulated contributions;

2. Beneficiary. Becomes a beneficiary as a result of the member's own retirement; or

3. Death. Dies.

* * * *

§ 17701. Member contributions

Each member shall contribute to the retirement system or have pick-up contributions made at a rate of 6.5% of earnable compensation, except as otherwise provided in this Part.

1. Employer pick-up. The contributions required to be made on behalf of a member under this section shall, after the effective date of this section, be picked up by the employer in lieu of contributions by the employee with a reduction of the member's salary consistent with section 17001, subsection 28-A.

2. No employee option. The employee may not choose to receive pick-up contribution amounts directly instead of having them paid by the employer to the system.

2-A. Optional members. If a person, whose membership in the Maine State Retirement System is optional under section 17652, elects a 5% salary increase in lieu of state

payment of the retirement contribution, pursuant to Public Law 1981, chapter 453, and chooses to participate in the Maine State Retirement System, the State shall pick up the retirement contribution with a reduction of the member's salary consistent with section 17001, subsection 28-A.

3. Treatment of pick-up contributions. Pick-up contributions shall be treated as follows.

A. Pick-up contributions shall be treated as the employer's contribution in determining tax treatment under the United States Internal Revenue Code for federal tax purposes, pursuant to the United States Code, Title 26, Section 414(h)(2).

B. For all other purposes, pick-up contributions shall be treated in the same manner and to the same extent as member contributions were treated before the effective date of this section.

4. Payment or repayment of contributions, back time, refunds or purchase of service credits. The board shall designate, by rule, a period of not less than 30 days during which annual direct payments or repayments as provided in this chapter may be made.

§ 17701-A. Member contributions; members hired after July 1, 1992

Notwithstanding section 17701, a member hired after July 1, 1992 shall contribute to the retirement system or have pick-up contributions made at a rate of 7.5% of earnable compensation, except as otherwise provided in this Part.

§ 17701-B. Member contributions on and after July 1, 1993

Notwithstanding sections 17701 and 17701-A, on and after July 1, 1993 all members shall contribute to the retirement system or have pick-up contributions made at a

rate of 7.65% of earnable compensation except as otherwise provided in this Part.

* * * *

§ 17705. Refund of accumulated contributions

If the service of any member has terminated, except by death or by retirement under this Part, the member shall be paid the amount of his accumulated contributions, under the following conditions.

1. Ten or more years of service. If the member has 10 or more years of creditable service at the time service is terminated, the member must have properly applied for a refund of accumulated contributions. Refunds of accumulated contributions are governed as follows.

A. Payment must be made after termination of service and not less than 22 days nor more than 60 days after receipt of the application and receipt of the last payroll upon which the name of the member appears, whichever occurs later.

B. An application for refund is void if the member filing the application returns to service as a state employee or teacher before issuance of the payment.

C. Only contributions made by a particular member or picked up by the employer may be refunded to that member under this section.

2. Less than 10 years of service. If the member has less than 10 years of creditable service at the time service is terminated, refunds of accumulated contributions are governed as follows.

A. Payment must be made after termination of service and not less than 22 days nor more than 60 days after receipt of the application and receipt of the last payroll upon which the name of the member appears, whichever occurs later.

B. No interest may be added to the member's account for any period beyond the 5th anniversary of the date of the member's termination of service, except that interest on accumulated contributions related to a member's compensation for service rendered as a part-time, seasonal or temporary employee after December 31, 1991 must be added as required by 26 CFR Part 31.

C. An application for refund is void if the member filing the application returns to service as a state employee or teacher before issuance of the payment.

D. Except when inclusion of a portion of employer contributions is required by paragraph F, only accumulated contributions made by a particular member or picked up by the employer may be refunded to that member under this section.

E. The members must have properly applied for a refund of accumulated contributions, except that the retirement system may make an automatic refund of contributions if the member has not properly applied for a refund and the amount of accumulated contributions is less than $650. In the case of a part-time, seasonal or temporary employee the $650 limitation does not apply.

F. The amount of the refund of accumulated contributions related to a member's compensation for service rendered as a part-time, seasonal or temporary employee after December 31, 1991 must be at least equal to 7.5% of the member's compensation for that service plus interest as provided by section 17156. The right to a refund under this paragraph is nonforfeitable until the member has accrued 10 years of creditable service but does not constitute a right to a retirement benefit.

* * * *

§ 17801. Amendment not to cause reduction in benefit

No amendment to this Part may cause any reduction in the amount of benefits which would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

* * * *

§ 17806. Cost-of-living adjustment to retirement benefits

Cost-of-living adjustments to the retirement benefits being paid to retired state employees, teachers or beneficiaries of either shall be governed as follows.

1. Determination of adjustment. The cost-of-living adjustment shall be determined as follows.

A. Whenever there is a percentage change in the Consumer Price Index from July 1st to June 30th, the board shall automatically make an equal percentage increase or decrease in retirement benefits, beginning in September, up to a maximum annual increase or decrease of 4%.

B. Whenever the annual percentage increase in the Consumer Price Index from July 1st to June 30th exceeds 4%, the board shall make whatever adjustments in the retirement benefits are necessary to reflect an annual increase of 4% and shall submit a supplemental budget request to the Governor for the additional funds that would be required to make adjustments in the retirement benefits to reflect the actual increase in the Consumer Price Index. The request shall include a report stating the cost of the 4% increase, the actual percentage increase in the Consumer Price Index and the percentage adjustments granted during the previous 5 years. The board shall make an additional adjustment in the retirement benefits in the month following the appropriation only in that amount.

C. Notwithstanding any other provision of this section, the amount of annual retirement benefit otherwise payable under this Part may not be less than the retired member received on the effective date of his retirement or on July 1, 1977, whichever amount is greater.

2. Cost. The board shall determine the costs of the adjustments under this section and shall include those costs in its budget requests.

3. Eligibility. Cost-of-living adjustments under this section must be applied to the retirement benefits of all retirees who have been retired for at least 12 months before the date that the adjustment becomes payable, except that a member who has less than 10 years of creditable service on July 1, 1993 may not receive a cost-of-living adjustment until at least 12 months after reaching normal retirement age. Beneficiaries of deceased retirees and members are eligible for the cost-of-living adjustment at the same time the deceased retiree or member would have become eligible. A member who is eligible to retire as of June 30, 1993 and who actually retires effective no later than July 1, 1994 is eligible for the cost-of-living adjustment if that member has been retired for at least 6 months before the date that the adjustment becomes payable.

* * * *

§ 17851. Qualification for benefits

1. Member in service; 10 years of creditable service on July 1, 1993. A member who is in service when reaching 60 years of age, or is in service after reaching 60 years of age, qualifies for a service retirement benefit if the member:

A. Retires upon or after reaching 60 years of age; and

B. Has been in service for a minimum of one year immediately before retirement or has at least 10

years of creditable service, which may include creditable service as a member of the Maine Legislative Retirement System under Title 3, section 701, subsection 8, before becoming a member of the Maine State Retirement System.

This subsection applies to members who, on July 1, 1993, have 10 years of creditable service or who have reached 60 years of age and have been in service for a minimum of one year immediately before that date. For the purpose of calculating creditable service under this subsection only, creditable service includes time during which a member participated in the voluntary cost savings plan or the voluntary employee incentive program, authorized by Public Law 1989, chapter 702, section F-6 and Public Law 1991, chapter 591, Part BB and chapter 780, Part VV, or 10 years of combined creditable service under this Part and Title 3, chapter 29, or creditable service available to a member that the member was eligible to purchase on June 30, 1993 and that the member does purchase in accordance with rules adopted by the board.

1-A. Member in service; less than 10 years creditable service on July 1, 1993. A member who is in service when reaching 62 years of age, or is in service after reaching 62 years of age, qualifies for a service retirement benefit if the member:

A. Retires upon or after reaching 62 years of age; and

B. Has been in service for a minimum of one year immediately before retirement or has at least 10 years of creditable service, which may include creditable service as a member of the Maine Legislative Retirement System under Title 3, section 701, subsection 8, before becoming a member of the Maine State Retirement System.

This subsection applies to members who are not covered under subsection 1.

2. Member not in service; 10 years of creditable service on July 1, 1993. A member who is not in service

when reaching 60 years of age qualifies for a service retirement benefit if the member:

A. Retires upon or after reaching 60 years of age; and

B. Has at least 10 years of creditable service or 5 full terms as a Legislator, which may include creditable service as a member of the Maine Legislative Retirement System under Title 3, section 701, subsection 8, before becoming a member of the Maine State Retirement System.

This subsection applies to members who, on July 1, 1993, have 10 years of creditable service. For the purpose of calculating creditable service under this subsection only, creditable service includes time during which a member participated in the voluntary cost savings plan or the voluntary employee incentive program, authorized by Public Law 1989, chapter 702, section F-6 and Public Law 1991, chapter 591, Part BB and chapter 780, Part VV, or 10 years of combined creditable service under this Part and Title 3, chapter 29, or creditable service available to a member that the member was eligible to purchase on June 30, 1993 and that the member does purchase in accordance with rules adopted by the board.

2-A. Member not in service; less than 10 years creditable service on July 1, 1993. A member who is not in service when reaching 62 years of age qualifies for a service retirement benefit if the member:

A. Retires upon or after reaching 62 years of age; and

B. Has at least 10 years of creditable service or 5 full terms as a Legislator, which may include creditable service as a member of the Maine Legislative Retirement System under Title 3, section 701, subsection 8, before becoming a member of the Maine State Retirement System.

This subsection applies to members who, on July 1, 1993, do not have 10 years of creditable service.

3. Member with creditable service of 25 years or more. A member who has completed 25 or more years of creditable service qualifies for a service retirement benefit if he retires at any time after completing 25 years of service, which may include, for the purpose of meeting eligibility requirements, creditable service as a member of the Maine Legislative Retirement System under Title 3, section 701, subsection 8, before becoming a member of the Maine State Retirement System.

. . . .

§ 17852. Computation of benefit

1. Member in service. The amount of the service retirement benefit for members qualified under section 17851, subsection 1, shall be computed as follows:

A. 1/50 of the member's average final compensation multiplied by the number of years of his membership service and up to 25 years of his prior service. Membership service under this paragraph does not include creditable service under the Legislative Retirement System; or

B. The total amount of the service retirement benefit of any member qualifying under section 17851, subsection 1, who became a member before July 1, 1947, and for whom the date of establishment of the retirement system is July 1, 1942, must be at least equal to 1/2 of his average final compensation, if the member has at least 20 years of total creditable service, including at least 13 years of prior service if he retires upon or after reaching age 70.

2. Member not in service. The amount of the service retirement benefit for members qualified under section 17851, subsection 2, shall be computed in accordance with subsection 1.

3. Member with creditable service of 25 years or more; 10 years of creditable service on July 1, 1993. The amount of the service retirement benefit for members qualified under section 17851, subsection 3, is computed in accordance with subsection 1, except that:

A. The amount arrived at under subsection 1 is reduced by applying to that amount the percentage that a life annuity due at age 60 bears to the life annuity due at the age of retirement; and

B. For the purpose of making the computation under paragraph A, the board-approved tables of annuities in effect at the date of the member's retirement are used.

This subsection applies to members who, on July 1, 1993, have 10 years of creditable service. For the purpose of calculating creditable service under this subsection only, creditable service includes time during which a member participated in the voluntary cost savings plan or the voluntary employee incentive program, authorized by Public Law 1989, chapter 702, section F-6 and Public Law 1991, chapter 591, Part BB and chapter 780, Part VV, or 10 years of combined creditable service under this Part and Title 3, chapter 29, or creditable service available to a member that the member was eligible to purchase on June 30, 1993 and that the member does purchase in accordance with rules adopted by the board.

3-A. Member with creditable service of 25 years or more; less than 10 years of creditable service on July 1, 1993. The amount of the service retirement benefit for members qualified under section 17851, subsection 3, is computed in accordance with subsection 1, except that the benefit is reduced by 6% for each year that the member's age precedes age 62.

This subsection applies to members who, on July 1, 1993, do not have 10 years of creditable service.

. . . .

* * * *

Supreme Court, U.S.
FILED
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No. 97-1181

In The

Supreme Court of the United States

October Term, 1997

RICHARD M. PARKER, *et al.*,

Petitioners,

v.

DAVID S. WAKELIN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a statute establishing a state retirement system should be found to create binding contract rights, thus limiting future statutory amendments, absent a clear indication that the legislature intended to bind itself contractually.

2. Whether the unmistakability doctrine is applicable to a state's exercise of its legislative power to amend an existing statute establishing a state retirement system.

PARTIES

The list of parties contained in the petition should be amended to reflect that two of the respondents have been replaced since the commencement of this action. Respondent Claude Perrier, sued in his capacity as Executive Director of the Maine State Retirement System, has been succeeded by Kay R.H. Evans. Respondent William C. Bullock, Jr. has been succeeded as a trustee of the Maine State Retirement System by Peter Leslie. Ms. Evans and Mr. Leslie should therefore be substituted as respondents pursuant to Sup.Ct. Rule 40.3.

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BRIEF IN OPPOSITION

Respondents David S. Wakelin, Kay R.H. Evans, John M. Kimball, Peter Leslie, George A. Burgoyne, Eunice Cotton, Charles M. Jackson, Grover B. MacLaughlin, and the Maine State Retirement System respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in the above – captioned case. The First Circuit's opinion is reported at 123 F.3d 1 and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-17a.

STATEMENT OF THE CASE

1. The Maine State Retirement System

This case involves the constitutionality of certain amendments made by the Maine Legislature in 1993 to the statutes governing the Maine State Retirement System ("MSRS").

The Maine State Retirement System was originally established by statute in 1942, and public school teachers were included within the system five years later. Under the applicable statutes, which are codified at 5 M.R.S.A. §§ 17001-18806 (1989 and Supp. 1997), the MSRS is funded by mandatory contributions from both the members of the System and from the State. In view of Maine's longstanding tradition of financial support for primary and secondary education, the employer contribution for public school teacher retirement is paid, not by the local school districts who employ the teachers, but by the State

Legislature through biennial appropriations. *See* 5 M.R.S.A. § 17153.

Members of the MSRS qualify to receive retirement benefits upon (1) reaching the statutory retirement age and (2) satisfying a years of service requirement (for members still in service, at least one year of service prior to retirement; for members no longer in service, at least 10 years of creditable service). 5 M.R.S.A. §§ 17851(1)-17851(2-A). Eligible retirees receive a retirement benefit equalling two percent of the retiree's "average final compensation" multiplied by the number of years of creditable service. 5 M.R.S.A. § 17852. Alternatively, a member becomes eligible to receive retirement benefits immediately regardless of age if he or she retires with at least 25 years of creditable service. 5 M.R.S.A. § 17851(3). In that case, however, the amount of the benefit is reduced by an early retirement penalty constituting a specified percentage for each year that the retiree's age at retirement is less than the statutory retirement age. 5 M.R.S.A. § 17852(3). Members who leave state service before obtaining 10 years of creditable service do not qualify for retirement benefits but are entitled to a return of the employee portion of the retirement contributions made on their behalf, plus interest. 5 M.R.S.A. § 17705(2).

As originally enacted, Maine's retirement statute contained no express statement relating to future statutory amendments. In 1975, however, the Legislature enacted a provision which, as most recently recodified, reads as follows:

> No amendment to this Part may cause any reduction in the amount of benefits which would be due to a member based on creditable service, earnable compensation, employee contributions, pick – up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

5 M.R.S.A. § 17801, *originally enacted by* Me. Laws 1975, ch. 622, § 6.

2. The Onset of the State's Budget Crisis

In the fall of 1990, as a result of a downturn in Maine's economy, the State's projected revenues were estimated to fall significantly below the amount necessary to maintain current services. Since Maine's Constitution requires the state to maintain a balanced budget, the Legislature responded at its First Regular Session in 1991 by making a number of budgetary cuts. Among those cuts were three changes to the benefit structure of the Retirement System ("the 1991 amendments"); these changes were made applicable only to those participants in the Retirement System who had seven or fewer years of creditable service (three fewer than the 10 years necessary to qualify for retirement benefits). The specific changes in question (1) increased the statutory retirement age from 60 to 62; (2) increased the penalty for early retirement from approximately 2.25 percent to six percent for each year preceding the retirement age of 62; and (3) eliminated the ability of a retiree to include payments for up to 30 days of unused sick time or vacation time in the calculation of a retiree's "average final compensation." *See* Me. Laws 1991, ch. 591, §§ EEE-3, EEE-7, EEE-8,

EEE-10. The relevant statutory provisions with respect to members of the Retirement System who had more than seven years of creditable service or who had already reached retirement age and were still in service with at least one year of creditable service remained unchanged.

Following the enactment of these provisions, a state court lawsuit challenging the constitutionality of the 1991 amendments under the Contracts Clause of the U.S. Constitution was brought on behalf of a class of state employees with seven or fewer years of creditable service. The lawsuit reached the Supreme Judicial Court of Maine in the late spring of 1993, and on June 23, 1993 that court issued a decision upholding the 1991 amendments against constitutional challenge. *Spiller v. State*, 627 A.2d 513 (Me.), *motion to file petition for certiorari out of time denied*, 510 U.S. 986 (1993). The court noted that Maine's retirement laws do not contain any "clear indication of a legislative intent to create immutable contract rights for all state employees." *Id.* at 516. In fact, it found that the relevant statutes compelled a contrary conclusion. The primary basis for the court's conclusion was the previously-quoted statement in 5 M.R.S.A. § 17801 that "no amendment to this Part may cause any reduction in the amount of benefits which would be due to a member . . . on the date immediately preceding the effective date of the amendment." The Maine Supreme Judicial Court held that this language "reserves to future legislatures the power to modify prospective [pension] benefits for employees to whom benefits are not then due." 627 A.2d at 516.

3. The 1993 Amendments

While the *Spiller* case was pending, the financial situation of the State was significantly worsening. As a result, the Maine Legislature was faced at its First Regular Session in 1993 with the necessity of effecting even more dramatic savings in governmental expenditures in order to balance the State's budget. Because the State's contributions for state employee and teacher retirement constituted one of the State's largest single expenditures, the Legislature again considered proposed amendments to the retirement statutes. On June 30, 1993, after the Maine Supreme Judicial Court had issued its decision in *Spiller*, the Legislature enacted six additional amendments (the "1993 amendments") with respect to retirement benefits as part of a much larger package of budget cuts and cost savings applicable to the state budget as a whole. *See* Me. Laws 1993, ch. 410.

The first three of the 1993 amendments simply extended the three changes made in 1991 (increase in statutory retirement age from 60 to 62, increase in early retirement penalty, and limitation on inclusion of unused sick and vacation time as "average final compensation") to all state employees and teachers who had not reached retirement age and who had fewer than 10 years of creditable service as of July 1, 1993. Me. Laws 1993, ch. 410, §§ L-12, L-34, L-35, L-38, *amending* 5 M.R.S.A. §§ 17001(13)(B), 17851(2-A), 17852(3-A). Previously, as noted above, these changes had been applicable only to state employees and teachers who had not reached retirement age and had seven or fewer years of creditable service. Extending these changes to state employees and teachers with fewer than 10 years of creditable service

did not affect any state employees or teachers who had met the years of service requirement as of the effective date of the 1993 amendments.

The other three amendments made prospective changes applicable to all participants in the Retirement System, including employees and teachers who had 10 or more years of creditable service and had therefore met the years of service requirement. The first of these changes was an increase from 6.5 percent to 7.65 percent in the amount that employees were required to contribute toward their future retirement benefits. Me. Laws 1993, ch. 410, § L-28, *enacting* 5 M.R.S.A. § 17701-B. The second was a limitation of five percent per year and a total of 10 percent over the highest three years in the maximum percentage by which an increase in salary in a member's three highest salary years could be included in the calculation of the member's service retirement benefit. Me. Laws 1993, ch. 410, § L-13, *amending* 5 M.R.S.A. § 17001(13)(C). The final change required that retirees be retired for at least 12 months before they could receive an annual cost of living increase, whereas they previously were required to wait only six months. Me. Laws 1993, ch. 410, § L-3, *amending* 5 M.R.S.A. § 17806(3).

4. Proceedings Below

Eleven months after the 1993 amendments became effective, petitioners, acting on behalf of a class consisting of all Maine public school teachers, filed this action in federal court challenging the constitutionality of all six of the 1993 amendments on a variety of grounds, including the Contracts Clause. Since three of the 1993 amendments

merely extended the 1991 amendments to all MSRS participants who had not yet satisfied the years of service requirement, petitioners in effect sought to relitigate the issues decided in *Spiller* as well as to challenge the three new changes that were instituted in 1993.

In a decision issued on August 1, 1996, the district court drew a distinction between those teachers who had satisfied the years in service requirement as of the effective date of the 1993 amendments – whose benefits it described as having "vested" – and those teachers who had not yet met the years of service requirement and who therefore had not qualified to receive a pension upon reaching the required age. Specifically, the district court held that the 1993 amendments violated the Contracts Clause only as applied to those members of the MSRS who had satisfied the years of service requirement as of the effective date of the 1993 amendments. App. at 35a-39a; 937 F.Supp. 46, 51-58 (D.Me. 1996).

Both parties appealed to the United States Court of Appeals for the First Circuit. Petitioners contended that the district court should have found that a contractual relationship existed from the beginning of employment and thereby invalidated the 1993 amendments in their entirety. Respondents argued that the district court had erred in invalidating the 1993 amendments as to those teachers who had satisfied the years of service requirement. The district court stayed its order pending appeal, acknowledging, *inter alia*, that its decision was inconsistent with the Maine Supreme Judicial Court's decision in *Spiller*. Order Granting Defendants' Motion to Stay, entered November 15, 1996 at 3-4.

The First Circuit, in an opinion issued on August 11, 1997, followed this Court's decisions in *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) and *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937), in holding that legislative enactments such as Maine's retirement statutes do not create contractual rights absent a clear indication that the Legislature intended to create a binding contract. Pet. App. 8a. In applying this rule to Maine's retirement statute, the First Circuit focused on 5 M.R.S.A. § 17801, which it found reflected the State's general intent to reserve the power to make changes with respect to the terms and conditions of the Retirement System while arguably creating contractual rights only with respect to any retirement benefits that were due on the date immediately preceding any statutory amendment. Pet. App. 14a.

> [T]he State's self-imposed limitation on its legislative power through section 17801 may reasonably serve as an indication of its intent to guarantee pension benefits once they are "due," as well as an obvious reservation of amendment powers with regard to the amount of benefits that are not "due."

Id.

Finding that the case therefore turned on the meaning of which benefits were "due," the First Circuit took into account the relevant statutory language, the decision of the Maine Supreme Court in *Spiller*, and the principle that statutes will not be found to create binding contractual rights absent a clear indication of legislative intent. Pet. App. 14a-17a. It concluded that section 17801 should be interpreted to protect those retirement benefits as to

which teachers had an immediate right to payment. Pet. App. 16a. Since the 1993 amendments did not alter any benefits as to which petitioners had a right to immediate payment, the First Circuit found that there had been no impairment of contractual rights.

In light of its ruling, the First Circuit did not reach a principal argument made by respondents below – that even if section 17801 were interpreted to protect the accrued retirement benefits of teachers who had satisfied the years of service requirement, the 1993 amendments should nevertheless be found valid because they did not impair any accrued benefits but instead merely altered prospectively certain terms and conditions with respect to the accrual and calculation of future benefits – a result permitted under 5 M.R.S.A. § 17801.

REASONS FOR DENYING THE WRIT

Petitioners contend that this Court should grant review to revisit its 1889 decision in *Pennie v. Reis*, 132 U.S. 464 (1889). Contrary to petitioners' arguments, however, the determination of when contractual rights exist under state statutes establishing state retirement systems is not controlled by *Pennie*, but by subsequent decisions culminating in *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451 (1985). *Atchison, Topeka and Santa Fe* held that legislative enactments are not presumed to create contractual rights absent a clear indication that the Legislature intended to bind itself contractually; it further requires a detailed examination of the particular statute at issue to determine whether

there is a sufficiently clear intent to create a contractual relationship. The First Circuit was therefore entirely correct in determining that there is no "blanket answer" to the question of whether retirement statutes create contractual rights (Pet. App. 6a) and in evaluating the Maine retirement statute under the analysis set forth in *Atchison, Topeka and Santa Fe*. There is no need for this Court to revisit that issue.

Petitioners further argue that review is warranted here because of the diversity of approaches followed by state courts of last resort in considering whether contractual rights are created under state retirement statutes. The problem with this argument is that the diversity of approaches among state courts results either from differences in the relevant state statutes involved or from differences in state contract law itself. Contrary to petitioners' apparent belief, it is not this Court's role to harmonize the rulings of state courts of last resort on issues that are primarily based on state law.

On the second question presented in their petition, petitioners invite the Court to rule that the unmistakability doctrine does not apply in determining whether state retirement statutes create contractual rights. On this issue, petitioners do not contend that there are any conflicts among federal courts of appeal or state courts of last resort, but merely argue that the applicability of the unmistakability doctrine is an important question of federal law that should be settled by this Court. The short answer to this argument is that, notwithstanding petitioners' assertions, the unmistakability doctrine is squarely applicable in this case because Maine

was indisputably exercising its sovereign power to legislate on matters of state policy when it enacted the amendments to its retirement system that are at issue in this action. As a result, the First Circuit's application of the unmistakability doctrine in this case is fully consistent with *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996), and does not present an important issue of federal law calling for guidance from this Court.

As a corollary to their second question, petitioners also seek guidance as to whether the unmistakability doctrine restricts courts to an examination of the relevant statutory language or permits a broader inquiry into the circumstances surrounding the passage of the statute in question. This issue, however, is resolved by existing precedent. Indeed, the First Circuit expressly addressed the legislative history relied upon by petitioners but found that it did not clearly establish legislative intent to bind the State by contract in light of the language of the governing statute. Pet. App. 16a.

I. THE ESTABLISHMENT OF A CONTRACTUAL RELATIONSHIP

A. Applicable Supreme Court Precedent

Petitioners suggest that this Court should grant review in this case to revisit its decision in *Pennie v. Reis*, 132 U.S. 464 (1889), a precedent which petitioners describe as "obsolete" but "technically controlling." Pet. 10. At the outset, since the First Circuit noted the existence of *Pennie* but observed that it has been "ignored as precedent" (Pet. App. 10a), and since petitioners have not argued that *Pennie* has otherwise been judicially accorded

any controlling effect, one might well question whether this Court should grant certiorari to revisit a 109 year old decision that no longer appears to be given any independent weight as precedent. *See* R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice*, § 4.4 at 172 (7th ed. 1993).

More importantly, *Pennie v. Reis* is not this Court's last word on the issue of whether pension legislation establishes a contractual relationship. Instead, guidance on that issue comes from subsequent decisions of this Court, most notably *Dodge v. Board of Education*, 302 U.S. 74 (1937), and *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451 (1985).

Dodge is instructive because it involved a claim that an Illinois statute creating a teachers' retirement fund and specifically providing for a $1,500 annual payment upon retirement after 20 years of service created a contractual right that could not be impaired by subsequent legislation providing for only a $500 annual payment. In considering whether the Illinois statute governing teacher retirement created a contract, the Court stated as follows:

> In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute . . . The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be preserved until the Legislature shall ordain otherwise. . . .
>
> The Supreme Court of Illinois concluded that neither the language of the Miller law, nor the circumstances of its adoption, evinced an intent on the part of the Legislature to create a binding

> contract with the teachers of the State. While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters.

302 U.S. at 78-79 (footnotes omitted).

The *Atchison, Topeka and Santa Fe* case, decided 48 years later, did not involve state pension legislation, but nevertheless reaffirmed the continuing vitality of the *Dodge* decision, noting that:

> [f]or many decades, this Court has maintained that, absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937). . . .
>
> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of a state. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-05 (1938). Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

470 U.S. at 465-66. The Court in *Atchison, Topeka and Santa Fe* went on to reaffirm the principle that, in determining whether a particular statute gives rise to a contractual

obligation, the language of the statute is "of first importance." *Id., quoting Dodge*, 302 U.S. at 78.

The First Circuit correctly followed the *Atchison, Topeka and Santa Fe* decision in determining whether Maine's retirement statutes created any contractual rights that were impaired by the 1993 amendments. *See* Pet. App. 8a, 13a, 14a. To the extent that *Pennie v. Reis* is interpreted to hold that state statutes establishing retirement benefits can never create contractual rights,[1] *Pennie* has been superseded by the analysis set forth in *Atchison, Topeka and Santa Fe*, which does not foreclose the possibility that contract rights can be created but requires a clear showing that the Legislature intended to create such rights. There is absolutely no need for this Court to grant review in this case to revisit *Pennie*.

B. Conflicts Among State Courts of Last Resort and Federal Circuits

Petitioners also suggest that this Court should grant review to reconcile the diversity of approaches followed by state courts of last resort in considering whether contractual rights are created under state retirement statutes. Because this diversity either results from differences between the relevant state statutes or from differences in state contract law, petitioners' request that this Court

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[1] It is also possible to interpret *Pennie* as having found that no contractual relationship was created because nothing in the statute established such a relationship. *See* 302 U.S. at 471 ("there was no contract on the part of the state that its disposition should always continue as originally provided").

grant review in order to impose a "controlling analytical framework" (Pet. 16) is completely unwarranted.

At the outset, it is well-settled that although the determination of whether a contract exists for purposes of the Contracts Clause is ultimately an issue which federal courts are required to decide for themselves, that issue frequently requires examination of state law, *see, e.g., Appleby v. City of New York*, 271 U.S. 364, 380 (1926), and in those instances federal courts should "accord respectful consideration and great weight to the state's highest court." *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992).

Consistent with this approach, the court below evaluated the alleged existence of a contractual relationship under the federal standard set forth in the *Atchison, Topeka and Santa Fe* case and also gave appropriate weight to the decision of the Maine Supreme Judicial Court in *Spiller v. State*, 627 A.2d 513 (Me. 1993). *See* Pet. App. 15a-16a. In this respect, the First Circuit's approach was essentially identical to that followed by the Second Circuit in *Pineman v. Fallon*, 842 F.2d 598, 600-01 (2d Cir.), *aff'g* 662 F.Supp. 1311, 1315-17 (D.Conn. 1987), *cert. denied*, 488 U.S. 824 (1988) (agreeing with Connecticut Supreme Court that state retirement statute did not create contractual rights that had been impaired by subsequent amendment). In *Kestler v. Board of Trustees*, 48 F.3d 800 (4th Cir.), *cert. denied*, 116 S.Ct. 186 (1995), the Fourth Circuit similarly relied upon its reading of state court decisions in holding that the North Carolina retirement statutes had

not created any contractual rights that were impaired by subsequent legislation.[2]

In contrast, in *State of Nevada Employees Assn. v. Keating*, 903 F.2d 1223 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990), the Ninth Circuit found that the Nevada retirement statute did create contract rights that were impaired by subsequent legislation terminating the right of employees to withdraw their pension contributions without penalty. It did so, however, only after noting that the State of Nevada had not contested that the retirement statute created contractual obligations and that the Nevada Supreme Court had expressly held that, upon entering the state work force, state employees had contractual retirement rights that could only be legislatively altered if any disadvantage to employees were accompanied by corresponding new advantages. 903 F.2d at 1224-25, citing *Public Employees' Retirement Board v. Washoe County*, 615 P.2d 972 (Nev. 1980).

Thus, the relevant caselaw from the federal circuits is consistent with the principle that (1) as a matter of federal law, the *Atchison, Topeka and Santa Fe* analysis governs the determination of whether retirement statutes create contract rights, but (2) nothing prevents states from creating greater contract rights with respect to retirement benefits – either through state legislative action or as a matter of state contract law as interpreted

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[2] In the *Kestler* case, the Fourth Circuit did not expressly discuss the *Atchison, Topeka and Santa Fe* standard, but there is no indication in the facts of that case that the North Carolina retirement statute in question contained any language evidencing an intent to create a binding contract.

by state courts of last resort. As petitioners note, a number of states have recognized broader contractual rights, even though, as the *Spiller* case demonstrates, Maine has not chosen to restrict its legislative power in this manner.

In sum, the diversity of judicial decisions noted by petitioners with respect to the creation of contractual rights by state retirement statutes is not surprising and is attributable to two causes. The first, as the First Circuit suggested (Pet. App. 13a) and as petitioners acknowledge (Pet. 15), is that there are differences between the relevant state statutes and the intent of the state legislatures that enacted them. The second is that there are differences between the manner in which state courts of last resort have chosen to interpret the contract law of their respective states. Such differences do not constitute a basis for this Court to grant certiorari since it is not this Court's role to harmonize the rulings of state courts on issues that are primarily based on state law.

C. Dispositive Issue in this Case is Unique to Maine

Certiorari is not warranted in this case for another reason as well – because under virtually any theory, the interpretation of 5 M.R.S.A. § 17801 is central to the case. To our knowledge, this provision is unique to Maine's retirement statute. As a result, any ruling in this case by this Court would not be likely to provide useful guidance to state and lower federal courts elsewhere in the nation.

Thus, if this Court were to consider whether contract rights exist under the Maine retirement statutes prior to retirement, it would not be relieved from addressing the

effect of section 17801, since that section only precludes reductions of amounts that are "due" and cannot reasonably be interpreted as a promise never to alter the retirement statutes in any manner. Indeed, although this issue was not reached by the First Circuit, respondents argued below that, even if section 17801 were interpreted to provide contractual protection to employees and teachers prior to retirement, that protection would still only apply to benefits that were "due" (i.e., had already been accrued) and would not preclude the Maine Legislature from making changes that were applicable prospectively to existing participants in the system so long as those changes did not reduce accrued benefits. Respondents further argued that under this theory, while more drastic forms of legislative revision might not be valid, the specific amendments made in 1993 would still withstand constitutional challenge.[3]

What this demonstrates is that an answer to the broad and rather abstract question posed by petitioners is

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[3] Specifically, Respondents argued below that the 1993 amendments affecting employees and teachers who had not yet met the years of service requirement could not be found invalid because those participants had not qualified for any pension and therefore had no accrued benefits. In addition, respondents argued that the 1993 amendments affecting participants who had met the years of service requirement could also be sustained because those amendments did not reduce any accrued benefits, but instead made only prospective (and relatively modest) changes with respect to the accrual of future benefits. By way of example, the 1.15% increase in employee contributions was prospective only; it did not affect years of creditable service previously earned, but required increased payments to earn creditable service in the future.

not likely to dispose of the case, which will still turn on the interpretation of section 17801. Whether or not the First Circuit erred in interpreting section 17801 and, if so, how section 17801 should correctly be interpreted are issues that are unique to Maine's retirement statute and that do not warrant review by this Court.

II. THE UNMISTAKABILITY DOCTRINE

A. Applicability to State Retirement Systems

In support of the second question contained in their petition, petitioners contend that the unmistakability doctrine should not be applied to state retirement systems, and that this is an important issue of federal law that should be resolved by this Court. Petition at 16-18. Petitioners' arguments on this issue do not withstand scrutiny.

Initially, petitioners seek to derive support for the proposition that the unmistakability doctrine should not be applied to retirement statutes from this Court's decision in *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996). According to petitioners, *Winstar* limited the applicability of the unmistakability doctrine to instances where enforcement of contractual obligations would block a "sovereign power" of the government. They then contend that, in establishing state retirement systems, states are not exercising sovereign power. Pet. 17-18.

At the outset, it bears emphasis that *Winstar* involved a case where there was no doubt that a contractual relationship existed – the government had entered into a written contract, and the issue was whether it could alter

that contract through subsequent legislation. In contrast, this case involves a somewhat different issue – whether, where no written contract exists, a statute should be construed as itself creating a contractual relationship. The latter question, respondents submit, may be governed more directly by *Atchison, Topeka and Santa Fe* than by *Winstar*.

More fundamentally, however, what petitioners overlook is that Maine established its retirement system through legislation and what is at issue in this case is Maine's ability to modify and revise its retirement statute by a further exercise of legislative power. The exercise of legislative power has uniformly been found to constitute a sovereign governmental act. *E.g., Winstar,* 116 S.Ct. at 2453-54 (plurality opinion); *id.* at 2477 (Scalia, J., concurring). *See Atchison, Topeka and Santa Fe,* 470 U.S. at 406 (legislative policies "are inherently subject to revision and repeal and to construe laws as contracts would be to limit drastically the essential powers of a legislative body").

Although the *Winstar* case produced multiple opinions, all of those opinions are consistent with the proposition that the unmistakability doctrine applies to any exercise of a sovereign's legislative power. Thus, the plurality found the unmistakability doctrine inapplicable only after emphasizing that the government had not been precluded from exercising its sovereign power to enact legislation applicable to thrift institutions as a whole but was instead only required to indemnify those particular thrift institutions with whom it had previously contracted. 116 S.Ct. at 2458. The concurring opinion found the unmistakability doctrine squarely applicable, *id.* at 2477

(Scalia, J.) (noting that the legislative enactment at issue was "an unquestionably sovereign act of government"), but found that the doctrine had been satisfied because the government had made an unmistakable promise to the thrift institutions in question. *Id.* at 2478. And the dissent argued both that the unmistakability doctrine was applicable and that it foreclosed the thrift institutions' claims. *Id.* at 2479-82 (Rehnquist, C.J., dissenting).

Simply stated, petitioners in this case are seeking to use the Contracts Clause to deny to the State of Maine its ability to exercise its legislative power to amend its retirement statutes. In the circumstances of this case, the First Circuit's application of the unmistakability doctrine was entirely consistent with *Winstar* and with prior precedent concerning the unmistakability doctrine. *E.g., United States v. Cherokee Nation*, 480 U.S. 700 (1987); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986).

Petitioners also seek to draw a distinction between government acting in its capacity as an employer and government acting in its capacity as sovereign. *See* Pet. 17 ("where . . . government is acting in its capacity as an employer, it is not exercising sovereign powers"). The first problem with this argument is that petitioners have apparently overlooked the fact that the State does not have an employment relationship with the petitioners in this case or the class of public school teachers whom they represent. Petitioners are the employees of local school districts, not the State, and the State's payment of the employers' share of petitioners' pension contributions results not from an employment relationship but from a

legislative policy choice to support primary and secondary school education. Moreover, while petitioners cite several cases that draw a distinction between government acting as an employer and government acting as a sovereign, those cases were decided in the context of the First Amendment and the double jeopardy clause and have no relevance here.[4] In any event, it is difficult to understand petitioners' reliance on those cases because they stand for the proposition that when the government is acting as an employer, it is freed from certain of the constitutional constraints that apply to its acts as sovereign.

In sum, none of the arguments advanced by petitioners even remotely support the conclusion that the applicability of the unmistakability doctrine to state retirement statutes presents an important federal issue that needs to be addressed by this Court.

B. Inquiry into History, Purpose, and Circumstances

Petitioners' final argument is that this Court should grant review to resolve the issue of whether analysis under the unmistakability doctrine is limited to the statutory language or whether it permits consideration of a statute's history, purpose, and circumstances. This issue has long since been resolved. The decisions of this Court establish beyond dispute that courts should look both to

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[4] *See* Pet. 17, citing *Waters v. Churchill*, 511 U.S. 661 (1994) (First Amendment); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (same); *United States v. McAllister*, 119 F.3d 198 (2d Cir. 1997) (double jeopardy); *United States v. Reyes*, 87 F.3d 676 (5th Cir. 1996) (same).

the statutory language and the circumstances of enactment – i.e., the relevant legislative history – in determining whether the Legislature intended to bind itself by creating contractual rights. *E.g., Atchison, Topeka and Santa Fe,* 470 U.S. at 468, 470 (considering language of statute and "circumstances surrounding its passage"); *Dodge v. Board of Education,* 302 U.S. at 79 (considering language of statute and "circumstances of its adoption").

Petitioners further argue that the First Circuit erred because it focused solely on statutory language in applying the unmistakability doctrine (Pet. 18), but this is demonstrably untrue. The First Circuit expressly acknowledged the existence of certain legislative history that had been noted by the district court and that had been "vigorously argued" by petitioners on appeal. Pet. App. 16a. In the end, however, the First Circuit, in keeping with the precept that the statutory language is "of first importance," *Atchison, Topeka and Santa Fe,* 470 U.S. at 466, did not find that the legislative history relied upon by petitioners was sufficient to supply the clear evidence of contractual intent missing in the statute. Pet. App. 16a. We submit that this finding by the First Circuit was correct. In any event, it does not present an issue requiring review by this Court.[5]

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[5] In the proceedings below, there was also a disagreement between petitioners and respondents as to whether certain of the evidence proffered by petitioners constituted cognizable legislative history. Although agreeing that legislative history could generally be considered, respondents urged the courts below to disregard certain materials submitted by petitioners on

CONCLUSION

The petiton for a writ of certiorari should be denied.

March 30, 1998

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the principle that legislative intent can be determined only by the text of the statute and its contemporaneous legislative history, not by "post hoc statements of interested onlookers." *E.g., Western Airlines v. Board of Equalization*, 480 U.S. 123, 131 n. (1987). To the extent that petitioners are now seeking to revive their claim that these materials should have been considered, this issue does not present an important issue of federal law or an issue that would have any applicability outside the confines of this case.

Supreme Court, U.S.
FILED
APR 9 1998

No. 97-1181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RICHARD M. PARKER, *et al.*,
Petitioners,
v.
DAVID S. WAKELIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. ESTABLISHMENT OF A CONTRACTUAL RELATIONSHIP

Petitioners' request for review of the first question presented—*i.e.*, whether and under what circumstances employees who are members of a state retirement system acquire a right to retirement benefits that is protected by the Contracts Clause when the state legislature has not expressly addressed the matter—is bottomed on two basic propositions. The first proposition is that this Court's decision in *Pennie v. Reis*, 132 U.S. 164 (1989), is squarely in conflict with modern Contracts Clause jurisprudence (Petition ("Pet.") at 9-10); the second proposition is that there is significant conflict among the state courts of last resort and federal courts of appeals that have addressed this question of federal law (Pet. at 11-16). In their Brief in Opposition ("Opp. Br."), respondents do not take issue with either of these propositions, but attempt to explain why they do not provide adequate basis for this Court to grant review.

As we demonstrate in Parts A and B below, respondents' efforts in this regard fall short—and in some respects serve only to confirm the need for guidance from this Court. In Part C, we address—and refute—respondents' remaining contention that review is not warranted because this case is controlled by a single provision of the Maine State Retirement System ("MSRS"), and a ruling by this Court "would not be likely to provide useful guidance to state and lower federal courts elsewhere in the nation." Opp. Br. at 17.

A. *Pennie v. Reis*: Respondents acknowledge that *Pennie* "hold[s] that state statutes establishing retirement benefits can never create contractual rights," Opp. Br. at 14, that this holding is no longer good law, *id.* at 13-14,

and that *Pennie* never explicitly has been overruled. *Id.* But, say respondents, because *Pennie* has not "been judicially accorded any controlling effect, one might well question whether this Court should grant certiorari to revisit a 109 year old decision that no longer appears to be given any independent weight as precedent." *Id.* at 11-12. Implicit in this question is the suggestion that the precedents of this Court lose their controlling effect with the passage of time, or, even worse, because they have been ignored by the lower courts. But this suggestion is directly contrary to *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), *Agostini v. Felton*, 117 S.Ct. 1997, 2017 (1997), and other cases, which establish that this Court reserves to itself the prerogative of overruling its own decisions, and unless and until this Court does so, all other courts are bound to apply that existing precedent.

Presumably recognizing that their threshold argument would undermine this important prerogative, respondents assert that *Pennie* in any event "has been *superseded* by the analysis set forth in [*National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451 (1985)], which [unlike *Pennie*] does not foreclose the possibility that contract rights can be created but requires a clear showing that the Legislature intended to create such rights." Opp. Br. at 14 (emphasis added). Respondents are simply wrong in suggesting that *Atchison* has implicitly "superseded" *Pennie*. While *Atchison* suggests a framework for dealing with the general question of whether legislative enactments create contract rights, it did not involve a state retirement system, or even a Contracts Clause challenge to a state statute. In short, *Atchison* is not a direct precedent, and as this Court recently reaffirmed in *Agostini*, "if a precedent has direct application in a case [*i.e.*, *Pennie*], yet appears to rest on some reasons rejected in some other line of decisions [*i.e.*, *Atchison*]," the lower courts are bound to "follow the case

which directly controls." 117 S. Ct. at 2017 (internal quotation marks omitted).[1]

What is more, *Atchison* says nothing at all about the question presented here, which is whether a statute that offers retirement benefits to potential employees in order to induce them to work for government reveals a legislative intent to enter into a unilateral contract for the provision of such benefits. That is the question answered in the negative by *Pennie* and the court below, and in the affirmative by the majority of state courts of last resort and the Ninth Circuit. This Court should grant review to resolve this dispute.

B. *Conflict Among State Courts of Last Resort and Federal Courts of Appeal*: Once again, respondents do not take issue with the basic proposition that informs this aspect of our request for review, conceding that there is substantial conflict among state courts of last resort and federal courts of appeals in regard to whether and when a state retirement system creates a contractual relationship that comes within the ambit of the Contracts Clause. "The problem with this argument," according to respondents, "is that the diversity of approaches . . . results either from differences in the relevant state statutes involved or from differences in state contract law itself . . . [and] it is not this Court's role to harmonize the rulings of state courts of last resort on issues that are primarily based on state law." Opp. Br. at 10. Respondents are mistaken as to the reason for this diversity, and, in turn, as to the role of this Court.

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[1] Respondents suggest that "guidance" as to the first question presented by the Petition also can be found in *Dodge v. Board of Educ.*, 302 U.S. 74 (1937). Although *Dodge* did involve the question of whether a state retirement system created a contractual relationship, we are aware of no court or secondary legal authority that has interpreted *Dodge* as "supersed[ing]" *Pennie*, Opp. Br. at 14, or that has attempted to harmonize the two decisions. Indeed, to the extent that this Court's 61-year-old decision in *Dodge* is in tension with its 109-year-old decision in *Pennie*, the case for granting review is that much stronger.

1. Although respondents attribute the diversity of approaches to "differences between the relevant state statutes," Opp. Br. at 14, they make no attempt to support this contention by an analysis of the decisions themselves. And, in fact, such an analysis reveals that the vast majority of state court decisions do not turn on the specific language of the statute in question, but rather reflect the particular court's view of how general principles of contract law should apply to state employee retirement systems. *See* cases cited in Pet. at 12-15, including by way of illustration, *Police Pension & Relief Bd. v. Bills*, 366 P.2d 581, 583 (Colo. 1961) (relying upon an "ever growing school of judicial thought"); *Public Employees' Ret. Bd. v. Washoe County*, 615 P.2d 972, 974 (Nev. 1980) (relying upon "the modern and better-reasoned view [of pension benefits])"; *Wagoner v. Gainer*, 279 S.E.2d 636, 642 (W. Va. 1981) (relying on "the great weight of modern authority").

2. Nor are respondents on firmer ground in attributing the diversity of approaches to "differences in state contract law." This is so for two reasons. First, although respondents emphasize this Court's observation in *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), that federal courts should "accord respectful consideration and great weight to the views of the State's highest court" in determining whether a state statute creates contractual rights that are subject to the Contracts Clause, *see* Opp. Br. at 15, they fail to reference the more critical language from *Romein*, which directly follows the quoted sentence:

> We accord respectful consideration and great weight to the views of the State's highest court, though ultimately we are bound to decide for ourselves whether a contract was made. The question whether a contract was made is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment.

503 U.S. at 187 (citations and internal quotation marks omitted). Because we are dealing here with a federal

question, it must be answered on the basis of uniform principles enunciated by this Court, and "differences in state law"—to extent that they exist, *see infra*—cannot be dispositive.

Second, and perhaps more important, respondents have misstated the relevant cases: it simply is not true that nuances in the law of contracts of individual states explain the divergent approaches that have been adopted. As the cases cited in the Petition indicate, most state courts of last resort have relied on general principles of contract law, as reflected in precedents from sister states and in secondary legal authorities. *See* cases cited in Pet. at 12-13.

C. Guidance to Courts Elsewhere in Nation: Respondents contend that review is not warranted in this case because they believe that the dispositive question is how to interpret a statutory provision—5 M.R.S.A. § 17801—that is "unique to Maine's retirement statute," and, "[a]s a result, any ruling in this case by this Court would not be likely to provide useful guidance to state and lower federal courts elsewhere in the nation." Opp. Br. at 17. This contention rests on a far too narrow reading of the First Circuit's decision, and misapprehends the quarrel that petitioners have with that decision.

To be sure, the court below viewed § 17801—which prohibits a reduction in retirement benefits that "would be due to a member"—as the critical statutory provision, and ruled against petitioners because it interpreted that provision as creating contractual rights at most only for those teachers to whom benefits were "currently payable," Pet. App. at 15a—*i.e.*, those already retired. *See* Pet. App. at 16a. But the First Circuit interpreted § 17801 as it did—and rejected the alternative interpretation made by the district court—because the court below concluded that the unmistakability doctrine applied, and it did "not think this language [in § 17801] could be said to reflect the unmistakable intent of the Maine legislature" to create

contractual rights for active members of the system. Pet. App. at 16a. The question presented by the Petition is not simply whether the First Circuit "erred in interpreting section 17801," Opp. Br. at 19, *within this analytical framework*—which it plainly did—but whether this is the appropriate analytical framework to use in determining whether a state retirement system creates a contractual relationship for purposes of the Contracts Clause. It hardly warrants extended discussion to demonstrate that the answer to this latter question will "provide useful guidance to state and lower federal courts elsewhere in the nation." *Id.* at 17.

II. THE UNMISTAKABILITY DOCTRINE

The second question presented for review—which involves the propriety of the analytical framework referenced at the end of Part I *supra*—has two parts. The first part asks whether the unmistakability doctrine applies in determining whether and when contractual rights sufficient to trigger Contracts Clause analysis arise under a state retirement system; the second part assumes, *arguendo*, that the unmistakability doctrine *does* apply, and asks whether that doctrine restricts a court solely to an examination of the statutory language, and bars inquiry into the history, purpose, and circumstances surrounding enactment of the statute. The considerable confusion reflected in the Opposition Brief with regard to both of these points confirms the need for such clarification.

A. Applicability: Petitioners cite this Court's recent decision in *United States v. Winstar*, 116 S. Ct. 2432 (1996), for the basic principle that the unmistakability doctrine applies in determining whether and when contractual rights arise *only* if the exercise of a "sovereign power" of government is involved. Respondents do not take issue with this principle, *see* Opp. Br. at 10-11, but they fail to understand what it means with regard to state retirement systems generally, and to this case specifically.

Respondents contend initially that *Winstar* is not on point because it "involved a case where there was no doubt that a contractual relationship existed—the government had entered into a written contract, and the issue was whether it could alter that contract through subsequent legislation." Opp. Br. at 19-20. In contrast, they say, "this case involves a somewhat different issue—whether where no written contract exists, a statute should be construed as itself creating a contractual relationship." *Id.* at 20. There is to be sure a factual difference between the two cases, but respondents miss the legal point. In both *Winstar* and the instant case, government made certain commitments: in the former case, a promise by a government agency that goodwill and capital credits could be counted toward the capital reserve requirements imposed by federal regulations, 116 S. Ct. at 2447; and here, a promise by the legislature to provide specific retirement benefits to potential employees in order to induce them to accept employment. Both cases pose the question of whether the unmistakability doctrine should apply in determining whether the initial promise created the type of contractual relationship that, under the Contracts Clause, government cannot unilaterally change by a subsequently enacted statute.

As *Winstar* makes clear, the answer to this question depends not—as respondents would have it—on whether the initial promise was made by a state agency or by the state legislature, but rather on "the different kinds of obligations the government may assume and the consequences of enforcing them." 116 S. Ct. at 2457. As Justice Souter's plurality opinion explains, the dispositive question is whether "enforcement of the contractual obligation alleged would block the exercise of a *sovereign power* of the Government," *id.* at 2457 (emphasis added), which Justice Souter identifies as a "power peculiar to the Government," such as the power "to tax or control navigation." *Id.* This Court concluded in *Winstar* that the power of government to determine whether goodwill and capital credits could

be counted toward the capital reserve requirements imposed by federal regulations did not fall into this category. *Id.* at 2447. We submit that when government, acting in its capacity as an employer, establishes a state retirement system, it likewise is not exercising a "power peculiar to the Government."

Respondents disagree. Rather than focusing on the substantive nature of the obligations involved (*e.g.*, promulgating capital reserve requirements, or establishing a state retirement system), respondents instead posit a formalistic rule pursuant to which the applicability *vel non* of the unmistakability doctrine depends on the particular mechanism that government uses in making the initial promise. Thus, respondents assert that "[t]he exercise of legislative power has uniformly been found to constitute a sovereign governmental act," Opp. Br. at 20, which leads them to conclude that the unmistakability doctrine applies to *any statutory promise regardless of the subject matter to which it relates*. But this cannot be, if, as this Court has held, applicability of the doctrine turns on "the different kinds of obligations the Government may assume and the consequence of enforcing them," 116 S.Ct. at 2457, and the dispositive question is whether compliance with the alleged obligations "will require the exercise (or not) of a power peculiar to Government." *Id.* This Court should grant review in order to resolve this dispute as to the teaching of *Winstar*.

B. *Inquiry Into History, Purpose, and Circumstances*: Assuming, *arguendo*, that the unmistakability doctrine applies in determining whether and when contractual rights arise under a state retirement system, the second part of the question presented is whether the doctrine allows a court to look beyond the naked statutory language, and consult other sources, such as the history, purpose, and circumstances surrounding enactment of the statute, in order to ascertain the "unmistakable" intent of the legislature. Respondents concede that the answer is yes, Opp.

Br. at 22, but they characterize as "demonstrably untrue," *id.* at 23, our contention that the First Circuit erred by "focus[ing] solely on statutory language in applying the unmistakability doctrine." *Id.* Once again, respondents' analysis indicates that there is a need for clarification as to how this undisputed legal principle is intended to operate in practice.

In the paragraph from the decision of the court below that is cited by respondents, *see* Opp. Br. at 23, the First Circuit rejects the district court's interpretation of 5 M.S.R.S. § 17801—which was based largely on an examination of the relevant legislative history. Pet. App. at 32a-35a. The court below observes that "even if this is a possible reading, we do not think this *language* could be said to reflect the unmistakable intent of the Maine legislature, particularly when the legislature could very well have indicated as much." Pet. App. at 16a (emphasis added). The court then references the legislative history that was relied on by the district court, *id.*, but concludes that, such history notwithstanding, "the language of section 17801 remains at best ambiguous, and we cannot find that the legislature as a whole unmistakably intended to create contract rights . . . . especialy where, as here, it would have been easy to make any such intention crystal clear." *Id.* Elsewhere in its decision, the First Circuit poses the question of "whether section 17801 should be read to protect a teacher—and possibly to create contract rights—whenever a teacher satisfies the service requirements even though the teacher is still in active service and no pension is currently payable." *Id.* at 15a. Despite its acknowledgment that the language could be considered "ambiguous," the court answers this question in the negative without reference to the legislative history, the purpose of the statute, or the circumstances surrounding its enactment, because the language of "Section 17801 does not clearly compel such a reading, since 'due' could easily be read to mean currently payable." Pet. App. at

15a. This is a misapplication of the unmistakably doctrine, which warrants review by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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